No. 06-856
Title: James LaRue, Petitioner
v.
DeWolff, Boberg & Associates, Inc., et al.
Docketed: December 21, 2006
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (05-1756)
Decision Date: June 19, 2006
Rehearing Denied: August 8, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 6 2006	Petition for a writ of certiorari filed. (Response due January 22, 2007)
Jan 16 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner
Jan 22 2007	Brief of respondents DeWolff, Boberg & Associates, Inc., et al. in opposition filed.
Jan 22 2007	Brief amici curiae of Seven Law Professors filed.
Feb 7 2007	DISTRIBUTED for Conference of February 23, 2007.
Feb 8 2007	Reply of petitioner James LaRue filed. (Distributed)
Feb 26 2007	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 18 2007	Brief amicus curiae of United States filed.
May 29 2007	DISTRIBUTED for Conference of June 14, 2007.
Jun 4 2007	Supplemental brief of respondents DeWolff, Boberg & Associates, Inc., et al. filed. (Distributed)
Jun 18 2007	Petition GRANTED.
Jul 5 2007	Motion to dispense with printing the joint appendix filed by petitioner James LaRue.
Jul 23 2007	Motion to dismiss the writ of certiorari filed by respondents DeWolff, Boberg & Associates, Inc., et al. (Distributed)
Jul 25 2007	Motion DISTRIBUTED for Conference of September 24, 2007.
Jul 27 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 30 2007	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 7, 2007.
Aug 2 2007	Petitioner's opposition to respondents' motion to dismiss filed. (Distributed)
Aug 6 2007	Brief amicus curiae of United States filed.
Aug 7 2007	Reply of respondent to petitioner's opposition of motion to dismiss filed. (Distributed)
Aug 7 2007	Brief amicus curiae of AARP filed.
Aug 7 2007	Brief of petitioner James LaRue filed.
Aug 7 2007	Brief amicus curiae of Pension Rights Center filed.
Aug 7 2007	Brief amicus curiae of Self Insurance Institute of America, Inc. filed.
Aug 7 2007	Brief amici curiae of Eleven Law Professors filed.
Aug 7 2007	Brief amicus curiae of National Employment Lawyers Association filed.
Aug 7 2007	Brief amicus curiae of Air Line Pilots Association, International filed.

Aug 20 2007	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Aug 29 2007	Consent to the filing of amicus curiae briefs in support of respondents received from counsel for the respondents.
Sep 6 2007	Extension of time within which to file respondents' brief on the merits to and including September 13, 2007.
Sep 11 2007	Brief amicus curiae of ERISA Industry Commitittee filed.
Sep 11 2007	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Sep 11 2007	Brief of respondents DeWolff, Boberg & Associates, Inc., et al. filed.
Sep 13 2007	Brief amicus curiae of American Council of Life Insurers filed.
Sep 18 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 20 2007	Letter received from counsel for respondents. (Distributed)
Sep 20 2007	Letter received from counsel for petitioner. (Distributed)
Sep 25 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 25 2007	Motion of respondents DeWolff, Boberg & Associates, Inc., et al. to dismiss the writ of certiorari DENIED.
Oct 10 2007	Application (07A306) for an extension of time within which to file petitioner's reply brief on the merits from October 16, 2007, to October 25, 2007, submitted to The Chief Justice.
Oct 11 2007	Application (07A306) granted by The Chief Justice for an extension of time within which to file petitioner's reply brief on the merits from October 16, 2007, to October 25, 2007.
Oct 15 2007	SET FOR ARGUMENT Monday, November 26, 2007.
Oct 19 2007	Record received from U.S.C.A. for the Fourth Circuit. (1 envelope)
Oct 24 2007	Record received from U.S.D.C. for the District of South Carolina. (1 envelope)
Oct 25 2007	Reply of petitioner James LaRue filed. (Distributed)
Oct 30 2007	CIRCULATED.
Nov 26 2007	Argued. For petitioner: Peter K. Stris, Costa Mesa, Cal., and Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Thomas P. Gies, Washington, D.C.

Supreme Court, U.S.
FILED

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No. 06-

In The

Supreme Court of the United States

James LaRue, Petitioner

v.

DeWolff, Boberg & Associates, Inc.; and DeWolff, Boberg & Associates, Inc., Employees' Savings Plan

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(2), provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title." 29 U.S.C. 1109 states that "a fiduciary with respect to a plan who breaches any * * * duties imposed upon fiduciaries * * * shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."

The First Question Presented is:

Does § 502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?[1]

2. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that a "civil action may be brought * * * by a participant * * * to obtain other appropriate equitable relief * * * to redress * * * violations" of the statute.

The Second Question Presented is:

Does § 502(a)(3) permit a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?[2]

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[1] Hereinafter, this will be referred to as the "§ 502(a)(2) Question."

[2] Hereinafter, this will be referred to as the "§ 502(a)(3) Question."

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James LaRue ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "court of appeals") in this case.

OPINIONS BELOW

The original opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 450 F.3d 570. Petitioner requested rehearing and rehearing *en banc*, and the United States Department of Labor filed a brief *amicus curiae* in support. The order denying rehearing (Pet App. 22a-29a) is published at 458 F.3d 359. The order and opinion of the district court granting respondents' motion for judgment on the pleadings (Pet. App. 15a-21a) and the order of judgment dismissing petitioner's complaint (Pet. App. 30a-31a) are unpublished.

JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and rehearing *en banc* (Pet. App. 22a-29a) on August 8, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974 are reproduced at Pet. App. 32a-35a: 29 U.S.C. 1002(1); 1002(2A); 1002(3); 1002(34); 1002(35); 1104(a)(1)(B); 1000; 1132(a)(2), and 1132(a)(3).

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates "employee benefit plans." 29 U.S.C. 1002(3) (noting that "employee benefit plans" include "employee pension benefit plans" and "employee welfare benefit plans").[1] The term "employee

[1] For a discussion of "employee welfare benefit plans" *see n.*8, *infra.*

pension benefit plan" encompasses two types of retirement plans: "defined benefit plans"[2] and "defined contribution plans."[3]

> A defined benefit plan promises a specified monthly benefit at retirement.
>
> * * *
>
> A defined contribution plan, on the other hand, does not promise a specific amount of benefits at retirement. In these plans, the employee or the employer (or both) contribute to the employee's individual account under the plan * * * These contributions generally are invested on the employee's behalf. The employee will ultimately receive the balance in their account, which is based on contributions plus or minus investment gains or losses. The value of the account will fluctuate due to the changes in the value of the investments. Examples of defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans.[4]

In the three decades since ERISA was enacted, the composition of employee pension benefit plans has overwhelmingly changed:

> While the number of defined benefit pension plans has declined, the number of 401(k) plans has grown

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[2] 29 U.S.C. 1002(35).

[3] 29 U.S.C. 1002(34). A "defined contribution plan" is also known as an "individual account plan." *Id.*

[4] United States Department of Labor Website at http://www.dol.gov/dol/topic/retirement/typesofplans.htm (last visited on November 1, 2006).

> dramatically. Section 401(k) of the Internal Revenue Code did not exist in 1974, and plans named for this tax code section did not really begin their growth until the early 1980's. In just over two decades, there are now an estimated 250,000 401(k) plans, covering 42 million workers, and holding an estimated $2 trillion in assets.[5]

According to the latest available government data, approximately $3 trillion in assets—more than half of all private pension plan funds—are currently held in defined contribution plans.[6]

2. Section 502(a) of ERISA is entitled "Civil enforcement." This section sets forth the exclusive remedies that are available to a civil litigant under the statute.[7] The importance of section 502(a) can hardly be overstated: the extraordinary breadth of subject matter covered by the ERISA statute coupled with an extremely strong ERISA

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[5] Testimony of Mr. Erik Olson, Board Member of AARP before the 107th Congress on February 27, 2002 at http://edworkforce.house.gov/hearings/107th/eer/enronfour22702/olsen.htm (last visited on November 5, 2006).

[6] Board of Governors of the Federal Reserve System, *Flow of Fund Accounts of the United States: Flows and Outstandings, Second Quarter 2006*, Statistical Release Z.1., at 113 (September 19, 2006) at http://www.federalreserve.gov/releases/Z1/Current/z1.pdf (last visited on November 3, 2006) ("Federal Reserve Statistics").

[7] *See e.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.")

preemption doctrine have resulted in the reality that § 502(a) provides the only means for the remediation of most wrongs suffered in the employee benefits or health care context.[8] As such, it is not surprising that this Court has decided several statutory interpretation cases involving the precise scope of § 502(a).[9]

Specifically, § 502(a) "contains a six-part list of remedies, of which the final three, subsections (4)-(6), are peripheral. Subsections (1)-(3) * * * constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought."[10] The questions

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[8] As explained in n.1, *supra*, ERISA covers all "employee benefit plans" as well as all "employee welfare benefit plans. An "employee welfare benefit plan" is defined as one that provides employees with "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. 1002(1). As of 2002, 137 million workers, retirees, and their families were covered by such plans. *See* Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, (CA6 2004). Almost all health insurance in the United States—except for Medicare—is provided through employer-sponsored plans and is thus subject to ERISA. *See* Loraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizeing Claims for Patients' Rights*, 42 Brandeis L.J. 529, 538 (2004).

[9] *See e.g.*, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (interpreting 502(a)(2)); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (interpreting 502(a)(3)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (same); *Sereboff et ux. v. Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 1869 (2006) (same).

[10] John T. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail Of Error In* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1334 (2002) (footnotes omitted) ("Langbein").

presented by this petition involve the interpretation of subsections (2) and (3).[11]

Section 502(a)(2) "is restricted by its terms to actions invoking fiduciary liability under ERISA § 409(a). Section 409(a) provides for recovery by the plan, not the participant or beneficiary who brings suit. (The participant or beneficiary benefits indirectly, through the enhanced value of the plan.) Section 409 authorizes recovery for 'any losses' and 'any profits,' and it further subjects the breaching fiduciary to 'such other equitable or remedial relief as the court may deem appropriate'"[12]

Section 502(a)(3) is a "'catchall' provision, in the sense that section 502(a)(3) 'act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy.'"[13]

3. Petitioner is a participant in the DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan (the "DeWolff Plan"), a 401(k) plan administered by DeWolff, Boberg & Associates, Incorporated ("DeWolff"). Pet. App. 2a. Like many defined contribution plans, the DeWolff Plan "permits participants who so desire to manage their own accounts by selecting from a menu of various investment options." *Id.*

On June 2, 2004, petitioner filed a civil action against DeWolff and the DeWolff Plan (together "respondents"). Pet. App. 15a. In his lawsuit, petitioner alleged that

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[11] "Section 502(a)(1) is the workhorse of ERISA remedy law, the provision under which routine benefit denial and other ERISA claims proceed." Langbein, *supra* n.10 at 1334 (footnotes omitted). It is not involved in this case.

[12] Langbein, *supra* n.10 at 1334-35 (footnotes and citation omitted).

[13] Langbein, *supra* n.10 at 1335 (footnotes omitted) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)).

respondents breached their duties to him under ERISA by failing to implement the investment strategy he had selected for his employee retirement account. Pet. App. 2a-3a, 15a. As compensation, petitioner requested that respondents return to his retirement account the amount by which it would have appreciated had defendants followed his instructions. Pet. App. 3a, 21a.

On February 2, 2005, respondents filed a motion for judgment on the pleadings claiming that the relief sought by petitioner for the alleged breach of fiduciary duty was not available under § 502(a) of ERISA. Pet. App. 16a. On June 23, 2005, a federal district court in South Carolina granted respondents' motion for judgment on the pleadings. Pet. App. 15a-21a. Petitioner filed a timely appeal to the Fourth Circuit. After full briefing and argument, the Fourth Circuit issued a published opinion on June 19, 2006. In this opinion, the court summarized the two questions presented as follows:

> The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of * * * ERISA, 29 U.S.C. 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.
>
> We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S.

28 (1993) and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here.[14]

Petitioner timely filed a petition for rehearing and rehearing *en banc*. The United States Department of Labor filed a brief *amicus curiae* in support. On August 8, 2006, the Fourth Circuit issued an order in which it rejected the arguments presented by the United States Department of Labor and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition squarely presents two related questions regarding section 502(a) of ERISA that have divided and confounded the courts of appeal. These unresolved questions are constantly recurring and their extraordinary importance has been openly acknowledged by the United States Solicitor General, the United States Department of Labor, as well as several notable commentators and jurist including members of this Court.

The sheer number of Americans and amount of money potentially affected by the resolution of the two questions presented render them as significant as the sentencing issues in *United States v. Booker*, 543 U.S. 220 (2005) and the damages issue in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This petition presents an ideal opportunity for resolution by this Court.

Certiorari should be granted.

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[14] Pet. App. 2a.

I. The §502(a)(2) Question Warrants Further Review.

Section 502(a)(2) of ERISA provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title"[15] which, in turn, provides that:

> a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.[16]

Petitioner in this case is a participant in a 401(k) plan. He has alleged that respondents, the plan and its fiduciary, breached the "duties imposed upon fiduciaries by [section 1104 of] this subchapter" when they "failed to invest his money as directed."[17] As remediation for this breach, petitioner sought that respondents "make good to [the] plan" the losses that resulted.[18]

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[15] 29 U.S.C. 1132(a)(2).

[16] 29 U.S.C. 1109 (*i.e.*, § 409 of ERISA).

[17] Pet. App. 15a. 29 U.S.C. 1104 (*i.e.*, § 404 of ERISA) is entitled "Fiduciary duties." Section 404(a)(1)(A) imposes a duty of loyalty by requiring that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries." 29 U.S.C. 1104(a)(1)(A). Section 404(a)(1)(B) imposes a duty of prudence by requiring that a fiduciary exercise "the care, skill, prudence, and diligence" of a "prudent man acting in like capacity." 29 U.S.C. 1104(a)(1)(B).

[18] As the district court noted in its opinion, "Plaintiff 'does not wish for the court to award him any money, but * * * simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty.'" Pet. App. 21a (quoting Petitioner's briefing before the district court). As the United States observed below:

In affirming the district court's granting of respondents' motion for judgment on the pleadings, the Fourth Circuit reasoned as follows:

> It is difficult to characterize the remedy plaintiff seeks as anything other than personal. He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him. We are therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as 1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan, in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan. But such a view finds no license in the statutory text.[19]

> The ultimate allocation of the losses to LaRue's plan account does not defeat their status as "losses to the plan." All losses recovered by individual account plans are necessarily allocated between individual accounts. * * * [As] earnings and losses occur within particular investments, these amounts 'are allocated to the participants' accounts' through accounting or bookkeeping entries.

Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Petition for Rehearing and Rehearing *En Banc* in *LaRue v. DeWolff, Boberg & Associates, Inc. et al.*, 450 F.3d 570 (July 12, 2006) (quoting David A. Littell et al., *Retirement Savings Plans: Design, Regulation and Administration of Case or Deferred Arrangements* 6 (1993)) at 5 ("U.S. Br.").

[19] Pet. App. 6a.

As explained herein, further review of the 502(a)(2) Question is warranted for three reasons. First, the ability of participants in "defined contribution plans" to bring suit under § 502(a)(2) to recover losses caused by breaching fiduciaries "is of exceptional importance."[20] Second, the Fourth Circuit's dramatic limitation, or elimination, of the ability of participants in "defined contribution plans" to recover losses under § 502(a)(2) is "unsupported under the statute."[21] Finally, the Fourth Circuit's resolution of the 502(a)(2) Question "conflicts with the decisions of every other court of appeals to have addressed the issue."[22]

A. As the United States noted below, the § 502(a)(2) Question "is of exceptional importance."

For most participants in "defined contribution plans," filing a civil action under § 502(a)(2) is the only means through which pension account losses caused by the misconduct of a fiduciary might ever be recovered. State law claims against a breaching fiduciary are preempted by ERISA, and "make-whole" (*i.e.*, compensatory) monetary relief under § 502(a)(3) is currently unavailable in most circuits. It was this very point that the United States impressed on the Fourth Circuit below when it observed that:

> At a minimum, combined with ERISA's preemptive effect and the panel's holding that no monetary relief is available under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), the decision leaves LaRue, and individual plaintiffs like him, without any means

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[20] U.S. Br. at 4.

[21] *Id.*

[22] *Id.* at 11-12.

whatsoever to recover losses caused even by the most egregious fiduciary breaches.[23]

Under the Fourth Circuit's interpretation of 502(a)(2), the breaching fiduciary of a "defined contribution plan" will now enjoy total immunity from personal liability for monetary losses caused by even the most egregious violation of ERISA provided that the fiduciary's misconduct has only depleted the retirement funds of a single participant in the plan.

As this case should illustrate, the risk of "single-participant" monetary losses resulting from fiduciary breach inheres in a "defined contribution plan." These plans are necessarily comprised of an individual account for each participant, and their fiduciaries must regularly discharge duties that could—if performed imprudently in violation of § 404(a)(1)(B) of ERISA—result in losses to the account of an individual participant (*e.g.*, the improper execution of investment instructions; the failure to provide material information; the negligent provision of financial advice, etc.). Any one of these acts might cause an individualized injury either because it was directed at, or relied upon by, only one plan participant.[24] Similarly, the fiduciary of a "defined

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[23] U.S. Br. at 1-2. It is worth noting that the Fourth Circuit's rule will protect breaching fiduciaries not only from injured plan participants but from the United States as well: "The Secretary of Labor brings many cases [under § 502(a)(2)] annually * * * and takes the position that if a fiduciary pockets even a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and has suffered a loss under ERISA's plain language. Because there is no principled way to distinguish between the wrongful failure to pay a single participant's contribution into a plan and the wrongful failure to carry out a single participant's directed investment instructions, under the panel's decision, suit a suit presumably would be precluded." U.S. Br. at 7-8.

[24] Although the 401(k) plan at issue in this case was administered by "a nationwide management consulting firm," Pet. App. 2a, there are undoubtedly countless "defined contribution plans" that have substantially fewer participants. Presumably, participants in small plans

contribution plan" could engage in deliberate conduct—in violation of § 404(a)(1)(A) of ERISA—that results in individual losses (*e.g.*, looting the account of a hapless participant; engaging in a self-dealing transaction with an individual participant, etc.).[25]

As noted earlier, *approximately $3 trillion in assets*—more than half of all private pension funds in this country—are currently held by defined contribution plans like the 401(k) plan in this case. Put simply, the importance of this issue cannot be ignored.

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are even more susceptible to suffer the type of individualized injury that is no longer remediable under the Fourth Circuit rule.

[25] Moreover, the United States correctly points out that:

> Although this case involves a single plan participant in a 401(k) plan whose claim for loss is based on the defendants failure to follow his investment directions, there is no clear and logical basis upon which to draw a line between this case and the many other cases involving the recovery of losses stemming from fiduciary breaches that primarily will benefit the accounts of only some defined contribution plan participants.

U.S. Br. at 3. Thus, under the Fourth Circuit's rule, every breaching fiduciary of a "defined contribution plan" who is sued under § 502(a)(2) is now likely to claim absolute immunity from suit under the statute except in the handful of cases in which *every* plan participant has been affected by the breach. That, in turn "is likely to force district courts and this Court to revisit the issue in numerous factual contexts as it attempts to draw the line between permissible and impermissible loss recoveries, despite ERISA's express authorization of the recovery of "any losses to the plan." U.S. Br. at 3.

B. As the United States noted below, the panel's resolution of the § 502(a)(2) Question is "unsupported under the statute."

There is no reason to believe that Congress intended the interpretation of § 502(a)(2) adopted by the Fourth Circuit. As the United States correctly argued below:

> The panel's decision is contrary to the express language of ERISA sections 409 and 502(a)(2), which authorize participants and beneficiaries alleging fiduciary breaches to bring suit to obtain "any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). LaRue alleges that, as a direct result of a fiduciary breach, the plan has fewer assets available for the payment of his benefits. If the allegations are true, LaRue is entitled to an order restoring "any losses" to the plan.[26]

In reaching its holding regarding § 502(a)(2), the Fourth Circuit did not point to a single statutory requirements that petitioner failed to satisfy. To the contrary, the court of appeals noted that:

> To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan.[27]

As the United States explained in their brief *amicus curiae*, there is nothing "narrow" about the view that petitioner sought the restoration of "losses *to the plan*." Petitioner's request for relief under § 502(a)(2) can *only* be viewed as

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[26] U.S. Br. at 2.

[27] Pet. App. 6a.

seeking "losses to the plan." This is true because when dealing with a "defined contribution plan,"

> any "contributions are made to a single funding vehicle," and "[a]s amounts are contributed to the trust," and earnings and losses occur within particular investments, these amounts "are allocated to the participants' accounts" through accounting or bookkeeping entries. Thus, although the plan assets are allocated to individual accounts in this manner, and the individual participant's benefit is ultimately dependent on the amounts so allocated, ownership of the accounts and of the plan's assets never passes, even in part, to participants. Rather, as a matter of statutory design, the participants have a beneficial interest in their accounts, but legal title is held in trust by one or more trustees, who have authority and discretion to manage and control the assets of the plan.[28]

In sum, when petitioner informed the district court that he "simply want[ed] the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty,"[29] that could only be accomplished by the precise procedure set forth in § 502(a)(2)—the payment by respondents (*i.e.*, the breaching fiduciaries) *to the plan*.

Unable to provide any statutory support for its interpretation of § 502(a)(2), the Fourth Circuit instead purported to base its holding on language from this Court's decision in *Massachusetts Mutual Life Insurance Co. v.*

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[28] U.S. Br. 5-6 (quoting David A. Littell et al., *Retirement Savings Plans: Design, Regulation and Administration of Case or Deferred Arrangements* 6 (1993) and citing 29 U.S.C. 1103(a); 26 U.S.C. 401(a); Rev. Rul 89-52, 1989-1 C.B. 110).

[29] Pet. App. 21a.

Russell, 473 U.S. 134 (1985).[30] The court of appeal's assertion that its § 502(a)(2) holding is compelled by this Court's decision in *Russell*, however, is completely without merit. *Russell* "present[ed] a single, narrow question: whether the §409 "appropriate relief" referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of ***extra-contractual damages*** for breach of fiduciary duty." *Russell*, 473 U.S. at 149 (Brennan, J., concurring) (emphasis added).

The plan participant in Russell did not request that the plan's fiduciaries "make good to [the] plan any losses to the plan resulting from each such breach." In fact, she did not even allege that the plan itself lost any value as the result of the fiduciaries' conduct. Instead, she claimed that she personally suffered emotional and physical harm due to an interruption of the payment of benefits and requested that the plan's fiduciaries pay *directly to her damages for mental and emotional distress as well as punitive damages. Id.* at 136-39.

Russell's teaching (*i.e.*, that recoveries under §§ 409 and 502(a)(2) must "inure[] to the benefit of the plan as a whole," *id.* at 140) can only support the interpretation of § 502(a)(2) urged by petitioner and the United States. In particular, the *Russell* Court's recognition that the focus of § 409 was to prevent the "misuse and mismanagement of plan assets," *id.* at 140 n.8 makes clear that—*in the context of a "defined contribution plan*"—actions like the one filed by Mr. LaRue are precisely what Congress contemplated in enacting § 502(a)(2).

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[30] *See e.g.*, Pet. App. 5a ("Recovery under [502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*," not to particular persons with rights under the plan) (quoting *Russell*, 473 U.S. at 140) (emphasis added by the Fourth Circuit).

C. As the United States noted below, the panel's resolution of the § 502(a)(2) Question "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits."

As the United States correctly argued in seeking *en banc* review by the Fourth Circuit:

> The panel's decision that 401(k) plan losses that will be allocated to an individual account are not recoverable under section 502(a)(2) is also of exceptional importance because it creates a conflict with the decisions of every other court of appeals to have addressed the issue. (discussing *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (CA3 2005); *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338 (CA 5 2005); *Steinman v. Hicks*, 352 F.3d 1101 (CA7 2003), and *Kuper v. Iovenko*, 66 F.3d 1447 (CA6 1995).
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> * * *
>
> The arguments rejected by the courts of appeals in the cases described above are no different in substance than the argument accepted by the panel here: that a participant may not sue under section 502(a)(2) to recover losses to his defined contribution plan that were caused by fiduciary breaches where the recovered losses will be allocated to his individual account.[31]

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[31] U.S. Br. at 11-14.

II. The § 502(a)(3) Question Warrants Further Review.

Section 502(a)(3) of ERISA authorizes a civil action

> By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[32]

In the seminal case of *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court addressed—for the first time—the meaning and scope of the phrase "equitable relief" in § 502(a)(3). The specific question presented in *Mertens* was whether a lawsuit filed by ERISA plan beneficiaries seeking monetary relief against a third party who participated knowingly in the plan fiduciaries' breach of their fiduciary duties was one for "appropriate equitable relief" under the statute.

In concluding that the beneficiaries' claim did not constitute "equitable relief," the Court announced the (now familiar) rule that § 502(a)(3) only authorizes civil actions seeking "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256 (emphasis in original).

In the decade or so following *Mertens*, the courts of appeal squarely divided over two extremely important questions regarding what, if any, *monetary relief* could qualify as "typically available in equity" for purposes of § 502(a)(3). One of these two circuit splits was over the

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[32] 29 U.S.C. 1132(a)(3).

§ 502(a)(3) Question itself. As the United States noted in a 2004 filing with the Fifth Circuit:

> This court [the Fifth Circuit] has not considered the question whether section 502(a)(3) of ERISA authorizes participants to recover direct monetary losses caused by a fiduciary breach. Both the Second and Seventh Circuits have held that participants can obtain such relief. *See Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 133 (2d Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000). The Fourth, Sixth, Eighth and Ninth Circuits have held the opposite. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (CA6 2001), *cert denied*, 535 U.S. 928 (2002); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (CA8 1999); *FMC Med. Plan v. Owens*, 122 F.3d 1258 (CA9 1997).[33]

The second circuit split involved a separate recurring question regarding the availability of monetary relief under § 502(a)(3): the courts of appeal divided over whether—and under what circumstances—lawsuits filed by plan fiduciaries seeking monetary reimbursement of advanced medical expenses from plan participants or beneficiaries pursuant to a contractual reimbursement provision were permissible under § 502(a)(3).[34] Recognizing the importance of that issue, this

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[33] Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellants and Requesting Reversal of the District Court's Decision in *Milofsky et al. v. American Airlines, Inc, et al.*, (No. 03-11087) (February 27, 2004) at http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.htm (last visited on November 1, 2006).

[34] When a participant in or beneficiary of an ERISA welfare plan is injured (*e.g.*, in an automobile accident), she will receive money from the plan (or its insurer) to pay for her medical expenses. The injured participant or beneficiary may also bring a personal injury lawsuit for

Court granted certiorari in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) ("*Great-West*"). In *Great West*, this Court clarified the *Mertens* test and made clear that, in assessing whether a claim is remediable under § 502(a)(3), a federal court must look not only at the category of relief sought but also at the historical context in which such a remedy would have been available in a pre-merger court of equity. *Great-West*, 534 U.S. at 216. Significantly, for purposes of this petition, *Great-West* did *not* resolve the § 502(a)(3) Question.

As explained herein, further review of the § 502(a)(3) Question is warranted for two reasons. First, the ability of participants in (and beneficiaries of) ERISA plans to bring suit under § 502(a)(3) to recover monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach is a "recurring issue" of "extraordinary importance." Second, the § 502(a)(3) Question was recently left open by this Court and continues to divide and confuse the courts of appeal. This Court's guidance is needed.

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money damages (including the recovery of medical expenses) against any third party who might have been responsible for her injuries. For this reason, plan fiduciaries commonly require that every plan participant contractually agree to reimburse medical expenses out of any personal injury settlement or judgment that she might recover. Whether, and under what circumstances, such reimbursement seeks relief that was "typically available in equity" and, thus, available under § 502(a)(3) was the precise question that divided the courts of appeal.

A. As the United States acknowledges, the § 502(a)(3) Question "is of extraordinary importance."

As the United States has repeatedly acknowledged, the § 502(a)(3) Question is constantly recurring and of exceptional importance. For example, in *Goeres v. Charles Schwab & Co., Inc., et al.*, the United States recently noted that:

> [the] case presents a significant and recurring remedial issue: whether section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits beneficiaries to recover monetary losses from fiduciaries who have breached their duties and caused harm to the beneficiaries. The Secretary has consistently taken the position, in this Court and others, that "appropriate equitable relief" in section 502(a)(3) includes recovery of monetary losses from fiduciaries because historically such relief was typically and exclusively available in equity.[35]

The recurring nature of the question cannot be overstated. The United States has chosen to address the question in *amicus curiae* briefs before this Court as well as throughout the courts of appeal.[36] The importance of the question is similarly manifest:

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[35] Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Requesting Reversal in *Goeres v. Charles Schwab & Co., Inc., et al (05-15282) located at* http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf (last visited on November 5, 2006).

[36] In the Second Circuit, *see* Brief of United States Sec'y of Labor as *Amicus Curiae* in *Coan v. Kaufman* (04-5173) (March 25, 2005) *at* http://www.dol.gov/sol/media/briefs/Coan(A)-3-25-2005.pdf (last visited November 5, 2006) ("U.S. Coan Br.") and Brief of United States Sec'y of Labor as *Amicus Curiae* Supporting Appellant's Petition for Panel and En

> the equitable nature of monetary relief to remedy fiduciary breaches – is of extraordinary importance, both in the Seventh Amendment context [] and in its impact on the ability of ERISA participants and beneficiaries who have been harmed by fiduciary breaches to bring claims for make-whole monetary relief.[37]

The interpretation of § 502(a)(3) now adopted by the majority of circuits—including the Fourth Circuit in this case—will permit "[f]iduciaries [to] violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused."[38] *See e.g., Farr v. U.S. West Communications, Inc.,* 151 F.3d 908 (CA9 1998) (acknowledging that plan fiduciaries violated their duties under ERISA by knowingly withholding information regarding material tax consequences but finding that the participants had no remedy because the amount of additional taxes incurred were legal damages).

Banc Rehearing in *Pereira v. Farace* (03-5035, 5055) at http://www.dol.gov/sol/media/briefs/pereirabrief.pdf (last visited November 5, 2006) ("U.S. Pereira Br."). In the Fourth Circuit, *see* U.S. Br., *supra n.18.* In the Fifth Circuit, *see U.S. Milofsky Br., supra n.33.* In the Ninth Circuit, *see U.S. Goeres Br., supra n.35;* In the Tenth Circuit, *see* Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Reversal of the District Court in *Callery v. The United States Life Insurance Company in the City of New York, J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet, Inc.* (03-4097) (August 20, 2003) *at* *http://www.dol.gov/sol/media/briefs/callery-08-20-2003.pdf* (last visited on November 5, 2006) ("U.S. Callery Br.")

[37] U.S. Pereira Br., *supra*, n.36.

[38] U.S. Callery Br., *supra* n.36.

B. As the United States acknowledges, the § 502(a)(3) Question was left open by this Court in *Aetna* and has divided the circuits.

The significance of the problem above—and the best hope for a solution—were recently articulated by members of this very Court.

> I also join "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *DiFelice* v. *AETNA U.S. Healthcare*, 346 F.3d 442, 453 (CA3 2003) (Becker, J., concurring).
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> Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided." *Id.*, at 456 (internal quotation marks omitted).
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> A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief.
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> * * *
>
> The Government notes a potential amelioration. Recognizing that "this Court has construed Section 502(a)(3) not to authorize an award of money damages against a *non-fiduciary*," the Government suggests that the Act, as currently written and interpreted, may "allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in

> equity at the time of the divided bench." Brief for United States as *Amicus Curiae* 27—28, n. 13 (emphases added); cf. *ante*, at 19 ("entity with discretionary authority over benefits determinations" is a "plan fiduciary"); Tr. of Oral Arg. 13 ("Aetna is [a fiduciary]–and CIGNA is for purposes of claims processing."). As the Court points out, respondents here declined the opportunity to amend their complaints to state claims for relief under § 502(a); the District Court, therefore, properly dismissed their suits with prejudice. See *ante*, at 20, n. 7. But the Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue.[39]

Following *Aetna*, the United States has continued to vigorously assert its interpretation throughout the courts of appeal. Recently before the Ninth Circuit, the government observed that the pre-*Great-West* circuit split on the § 502(a)(3) Question still continues to linger:

> In accordance with this [proper historical analysis required by *Great-West*], the Seventh Circuit has awarded monetary relief against fiduciaries as "appropriate equitable relief" in ERISA cases. *See Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). However, a number of other courts have held to the contrary. *See, e.g., Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481-82 (6th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 943- 44 (8th Cir. 1999); cf.

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[39] *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (Ginsburg, J, concurring).

> *Pereira v. Farace*, No. 03-5035(L), 2005 WL 1532318, at *7-9 (2d Cir. June 30, 2005) (in a state law breach of trust case, court holds that monetary relief from a breaching fiduciary is legal relief entitling defendants to jury trial.)[40]

The Seventh Circuit recently reaffirmed its position in *McDonald v. Household International, Inc.*, 425 F.3d 424, 430 (CA7 2005) ("It will be up to the McDonalds on remand to decide whether they wish to proceed with their case or to abandon it. In that connection, they may wish to take note of Justice Ginsburg's comment in her concurring opinion in *Davila*, in which she drew attention to the Government's suggestion that ERISA "as currently written and interpreted, may allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench."

That said, the majority of circuits have rejected the position taken by petitioner and the United States.

> [W]e now note the growing majority of appellate decisions opinion that the Supreme Court's interpretation of 502(a)(3) as it applies to non-fiduciaries would not differ with respect to fiduciaries. However, this court refused to dismiss the case at such an early stage because of the ongoing judicial debate over interpretation and intent of 502(a)(3).[41]

Rather than perform their own historical analysis, however, these "majority" courts have merely taken and misapplied

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[40] U.S. Goeres Br. at 16, n.7.

[41] *McDonald v. HSBC Finance Corporation*, 2006 WL 2669950 (S.D. Ind. 2006).

dicta from *Great West* in reaching their conclusion. For example, in explicitly rejecting the United States' interpretation of § 502(a)(3), the Second Circuit stated that:

> The Trustee contends that the holding of *Great-West* is inapplicable here because *Great-West* involved only non-fiduciary defendants. * * * [W]e are compelled to read *Great-West* as broadly as it is written. Nor can we ignore the Supreme Court's inclusion of footnote 2, highlighting a single exception to its rule that a defendant must possess the funds at issue for the remedy of equitable restitution to lie."[42]

The words of Judge Newman, who wrote a separate concurrence, are particularly instructive:

> Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties and the rarity of decisions requiring a jury for such claims, I am persuaded that the Supreme Court's dictum in *Great-West*, sends a signal that should not be ignored. * * * The statement is dictum with respect to an action against a fiduciary because the defendant in *Great-West* was not a fiduciary. But the Court appears to be little concerned with the nature of the defendant and critically concerned with whether the defendant is being compelled to disgorge specific, traceable funds in his possession, in which case the action is in equity, or to pay money out of his pocket, i.e., damages, to a claimant.[43]

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[42] *Pereira,* 413 F.3d at 340.

[43] *Id. at* 344 and 346.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1756

JAMES LARUE, PLAINTIFF-APPELLANT

v.

DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED;
DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED,
EMPLOYEES' SAVINGS PLAN, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
David C. Norton, District Judge.
(CA-04-1747-2)

Argued: May 22, 2006
Decided: June 19, 2006

Before: WILKINSON and TRAXLER, Circuit Judges, and
RICHARD L. WILLIAMS, Senior United States District Judge
for the Eastern District of Virginia, sitting by designation

OPINION

WILKINSON, Circuit Judge:

The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.

We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while § 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here. Plaintiff has alleged no unjust enrichment, unlawful possession, or self-dealing on the part of defendants, and the remedy he seeks falls outside the scope of the "equitable relief" that § 1132(a)(3) authorizes.

I.

DeWolff, Boberg & Associates, Inc. is a nationwide management consulting firm organized under the laws of South Carolina. It administers, and is thus a fiduciary of, an ERISA-regulated 401(k) retirement savings plan in which its current and former employees participate. The plan permits participants who so desire to manage their own accounts by selecting from a menu of various investment options.

Plaintiff James LaRue has participated in this 401(k) plan since 1993. He alleges that in 2001 and 2002, he directed

DeWolff to make certain changes to the investments in his plan account, but that these directions were never carried out. In 2004, he brought suit against DeWolff and the plan, claiming that this omission amounted to a breach of fiduciary duty.* According to the complaint, his "interest in the plan ha[d] been depleted approximately $150,000.00" as a result of defendants' failure to follow his instructions. To recover for this loss, the complaint sought "appropriate 'make whole' or other equitable relief pursuant to [29 U.S.C. § 1132(a)(3)]."

Defendants subsequently filed a Rule 12(c) motion for judgment on the pleadings, contending that plaintiff's requested remedy was not available under § 1132(a)(3). The district court agreed, and thereafter dismissed the case with prejudice.

Plaintiff appeals. We review de novo a district court's decision to grant judgment on the pleadings. *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002).

II.

In enacting ERISA, Congress sought to uniformly regulate the wide universe of employee benefit plans. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). A salient feature of this effort was the careful delineation of civil remedies available to litigants seeking to enforce their rights under such plans. *See id.* at 208-09. Congress broadly preempted previously available state-law causes of action, *see* 29 U.S.C. § 1144(a), and set forth in a single section of ERISA the exclusive list of civil actions available to parties

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* Accepting the allegations as pled, as we must, we shall assume without deciding that defendants' alleged conduct amounted to a breach of their fiduciary duties.

aggrieved by a statutory violation, *see id.* § 1132(a); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990).

Section 1132(a) stops short of providing ERISA complainants with a full arsenal of relief. ERISA is "an enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Its civil enforcement provision in particular attempts to settle "a tension between the primary ERISA goal of benefiting employees and the subsidiary goal of containing pension costs." *Id.* at 262-63 (internal quotation marks and alterations omitted). Congress has consequently made various "policy choices" resulting in "the inclusion of certain remedies and the exclusion of others." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

Interpretation of § 1132(a) is therefore no easy task. As the Supreme Court's ERISA decisions have repeatedly cautioned, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) (internal quotation marks omitted); *Mertens*, 508 U.S. at 261 (same). Section 1132(a) represents an "interlocking, interrelated, and interdependent remedial scheme" that "provide[s] strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

With these constraints in mind, we consider whether the statute's text provides the particular relief at issue here.

III.

Plaintiff first suggests that remuneration of his plan account finds express authorization in the text of 29 U.S.C. § 1132(a)(2). That subsection allows for a civil action "by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109, in turn, provides that

> [a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . .

29 U.S.C. § 1109(a).

Plaintiff's argument regarding the applicability of § 1132(a)(2) is made for the first time on appeal. Even if the argument were not therefore waived, *see, e.g.*, *Jones v. Liberty Mut. Ins. Co.* (*In re Wallace & Gale Co.*), 385 F.3d 820, 835 (4th Cir. 2004), he could not succeed on the merits. Recovery under this subsection must "inure[] to the benefit of the plan *as a whole*," not to particular persons with rights under the plan. *Russell*, 473 U.S. at 140 (emphasis added); *see also Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 714 (4th Cir. 1996). "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect

the entire plan, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142 (footnote omitted).

It is difficult to characterize the remedy plaintiff seeks as anything other than personal. He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him.

We are therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as § 1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account,* which is part of the plan. But such a view finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief.

This case is much different from a § 1132(a)(2) action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants. *See Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999); *see also In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 233, 235 (3d Cir. 2005); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995). In such a case, the "remedy will undoubtedly benefit [the plaintiff] and other participants in the [p]lan," but "it does not *solely* benefit the individual participants." *Smith*, 184 F.3d at 363 (emphasis added); *see also Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 605 (8th Cir. 1995) (permitting recovery for losses to the plan but not losses to the individual plaintiff beneficiaries for defendants' alleged breach of fiduciary duty). Here, by contrast, plaintiff seeks to particularize the recovery to

himself. Section 1132(a)(2) is not a proper avenue for him to obtain such relief.

IV.

We thus turn to plaintiff's second theory of relief, which relies on a different ERISA remedial provision, 29 U.S.C. § 1132(a)(3). That section authorizes a civil action

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Plaintiff contends that the "make whole" relief he seeks constitutes one of the forms of "other appropriate equitable relief" that the provision authorizes.

A.

In construing the scope of § 1132(a)(3), the Supreme Court has stressed that the term "equitable" is one of limitation. In *Mertens v. Hewitt Associates*, the Court held that the phrase "equitable relief" refers only to "those categories of relief that were *typically* available in equity" in the days of the divided bench. 508 U.S. at 256; *see also Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1873 (2006). The Court reasoned that other sections of ERISA expressly refer to "equitable or remedial relief," 29 U.S.C. § 1109(a), and "legal or equitable relief," *e.g.*, *id.* § 1132(g)(2)(E), thereby demonstrating that "equitable relief" connotes only a subset of the full palliative spectrum. *See Mertens*, 508 U.S. at 258. The Court refused to "read the statute to render the modifier superfluous," *id.*, a construction

that would undermine Congress's exclusive remedial scheme by opening a back door through which uninvited remedies might enter, *id.* at 257.

The particular definition of "equitable" that the Court has adopted finds support in a well-known principle of statutory construction. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Section 1132(a)(3) expressly mentions the right to "enjoin" certain acts or practices "*or* . . . to obtain *other* appropriate equitable relief" (emphasis added). The understanding of what "equitable" means in this context is necessarily informed by its association with injunctive relief, the quintessential exemplar of a remedy that equity alone would typically provide.

Determining the applicability of § 1132(a)(3) therefore requires a court to examine whether the form of relief a plaintiff seeks is, like an injunction, historically one that a court of equity rather than a court of law would have granted. *See Sereboff*, 126 S. Ct. at 1874. The Supreme Court has, in addition to injunctions, listed mandamus and restitution as examples of traditional equitable remedies. *See Mertens*, 508 U.S. at 256. Subsequent decisions of both the Supreme Court and this court have been wary of expanding the list beyond these archetypes and their closely related kin. *See, e.g. Varity Corp. v. Howe*, 516 U.S. 489, 495, 515 (1996) (reinstatement to a plan); *Griggs v. E.I. Dupont de Nemours & Co.*, 385 F.3d 440, 449 (4th Cir. 2004) (rescission); *Denny's, Inc. v. Cake*, 364 F.3d 521, 526 n.6 (4th Cir. 2004) (declaratory relief incident to an injunction).

B.

Mertens and its progeny compel the conclusion that the remedy plaintiff desires falls outside the scope of § 1132(a)(3). As in *Mertens*, although he "often dance[s] around the word," what plaintiff "in fact seek[s] is nothing other than compensatory *damages* — monetary relief for all losses . . . sustained as a result of the alleged breach of fiduciary duties." 508 U.S. at 255. "Money damages are, of course, the classic form of *legal* relief," *id.*, and have therefore remained conspicuously absent from the list of traditional equitable remedies available under § 1132(a)(3), *id.* at 256.

While that list does include "restitution," *id.*, this form of recovery is not so broad as to include the compensatory relief that plaintiff seeks. As the Supreme Court explained in *Great-West Life & Annuity Insurance Co. v. Knudson*, "not all relief falling under the rubric of restitution is available in equity." 534 U.S. at 212. In particular, "for restitution to lie in equity," as opposed to at law, "the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214; *see also id.* at 214 n.2 (noting a single "limited exception" applicable to "an accounting of profits").

The Supreme Court's most recent § 1132(a)(3) decisions demonstrate how the absence of unjust possession is fatal to an equitable restitution claim. In *Knudson*, the Court denied a restitutionary remedy under § 1132(a)(3) where "'the funds to which petitioners claimed an entitlement' were not in Knudson's possession, but had instead been placed in a 'Special Needs Trust' under California law." *Sereboff*, 126 S. Ct. at 1874 (quoting *Knudson*, 534 U.S. at 207, 214) (internal alterations omitted). More recently in *Sereboff v. Mid Atlantic Medical Services, Inc.*, the Court allowed a

claim for equitable restitution to proceed where "Mid Atlantic sought specifically identifiable funds that were within the possession and control of the Sereboffs." *Id* (internal quotation marks omitted). The Court in *Sereboff* reaffirmed the possession requirement it had announced in *Knudson*, but found that the "impediment to characterizing the relief in *Knudson* as equitable [was] not present" in the Sereboffs' case. *Id.*

The impediment is, however, present in this case, and it precludes plaintiff from recovering under an equitable restitution theory. Plaintiff does not allege that funds owed to him are in defendants' possession, but instead that these funds never materialized at all. He therefore gauges his recovery not by the value of defendants' nonexistent gain, but by the value of his own loss — a measure that is traditionally legal, not equitable. *See, e.g., Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944 (8th Cir. 1999); *see also Sereboff*, 126 S. Ct. at 1874 (claim may be characterized as legal if plaintiff does not "seek to recover a particular fund from the defendant"). Thus, at core, he seeks "to obtain a judgment imposing a merely personal liability upon the defendant[s] to pay a sum of money." *Knudson*, 534 U.S. at 213 (internal quotation marks omitted). As *Knudson* explained, historically "[s]uch claims were viewed essentially as actions at law," and they are therefore unavailable under § 1132(a)(3). *Id.*

C.

Plaintiff attempts to avoid this conclusion by arguing that his requested "make whole" relief represents something entirely different from the types of remedies that we or the Supreme Court have heretofore considered in the context of § 1132(a)(3). In particular, he emphasizes that this case involves a situation where a participant or beneficiary is suing a fiduciary for a breach of fiduciary duty. In his view,

the scope of "equitable" remedies available in such a case is broader than when a fiduciary sues a beneficiary (as was the case in *Knudson* and *Sereboff*) or when a beneficiary sues a non-fiduciary (as was the case in *Mertens*). Unlike either of those scenarios, the argument goes, this case can be analogized to a common law breach-of-trust action by a beneficiary seeking to recover lost trust profits, a remedy that trust treatises have labeled "equitable." *See Restatement (Second) of Trusts* §§ 197, 205(c) (1959); *see also* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 861 (rev. 2d ed. 1995).

The governing precedent, however, does not point as plaintiff suggests. In fact, *Mertens* squarely "rejected the claim that the special equity-court powers applicable to trusts define the reach of [§ 1132(a)(3)]." *Knudson*, 534 U.S. at 219; *see Mertens*, 508 U.S. at 256-57. While the generally exclusive jurisdiction of equity courts over breach-of-trust suits renders all remedies in such cases "equitable" in the sense that a court of equity has power to grant them, "equitable" in the context of § 1132(a)(3) has a narrower meaning. *Mertens*, 508 U.S. at 256. Under *Mertens*, "the relevant question is . . . whether a given type of relief was available in equity courts *as a general rule*," *Rego v. Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003) (emphasis added), rather than merely in the context of "*the particular case at issue*," *Mertens*, 508 U.S. at 256. "Equitable relief" therefore does not encompass the "many situations — not limited to those involving enforcement of a trust — in which an equity court could," by virtue of its jurisdiction over the claim at issue, "grant legal remedies which would otherwise be beyond the scope of its authority." *Id.* (internal quotation marks omitted).

That plaintiff can analogize this suit to a common law breach of trust action therefore proves of no avail in characterizing the relief he seeks as equitable. Plaintiff

admits that he lacks support for the notion that "make whole" relief was available in equity outside the context of trusts. It is therefore impossible for us to conclude that such relief "was available in equity courts as a general rule," *Rego*, 319 F.3d at 145.

The Sixth Circuit has reached a similar conclusion in a case presenting facts nearly identical to those before us here. In *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001), a beneficiary of an employee 401(k) plan sued a plan fiduciary for failing to comply with written directions to roll over his assets into a specific set of mutual funds. *Id.* at 479-80. The plaintiff asserted an entitlement to the difference between the "amount he would have earned" had the fiduciary followed his instructions and "the amount he in fact earned" as a result of the fiduciary's alleged breach of duty. *Id.* at 480. The court concluded that his requested remedy was unavailable under § 1132(a)(3). *Id.* at 481-83. It found that the plaintiff could not style his relief as "restitution" when he was measuring recovery by his own losses rather than the defendant's gains, *id.* at 482-83, and it rejected a strict congruence between § 1132(a)(3) and the common law of trusts, *id.* at 482 (citing *Mertens*, 508 U.S. at 256). It therefore dismissed the suit because "ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries." *Id.* at 482.

As *Helfrich* shows, the fact that a plaintiff happens to be a participant or beneficiary suing a fiduciary is entirely beside the point in the § 1132(a)(3) inquiry; the status of the parties does not determine the nature of the relief. Many other circuits, both before and after *Knudson*, have likewise rejected the notion that whether a particular form of relief is "equitable" depends on the identity of the parties. *See Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005); *Callery v. U.S. Life Ins. Co. in the City of*

N.Y., 392 F.3d 401, 409 (10th Cir. 2004); *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376. 378 (9th Cir. 1996); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994); *see also Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005) (noting that compensatory damages are unavailable under § 1132(a)(3) in suit for breach of fiduciary duty); *D'Amico v. CBS Corp.*, 297 F.3d 287, 289, 292 n.5 (3d Cir. 2002) (same). The teachings of *Mertens* and *Knudson* obligate us to agree, and plaintiff's contrary argument therefore fails to cast doubt upon our conclusion that the compensatory relief he seeks is legal, not equitable.

V.

Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of "ensuring fair and prompt enforcement of rights under a plan" on the one hand and "encourag[ing] . . . the creation of such plans" on the other. *Aetna Health*, 542 U.S. at 215 (internal quotation marks omitted). It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this — where there was no unjust enrichment, unlawful possession, or self-dealing — would seriously deter plan formation and the service of qualified individuals and institutions as fiduciaries. *Compare, e.g.*, *Mertens*, 508 U.S. 262-63 (discussing negative effects of expansive ERISA liability).

Congress's decision to omit such liability hardly leaves a plan participant or beneficiary in plaintiff's position without recourse. He could, for example, seek an injunction compelling compliance with his investment instructions, *see* 29 U.S.C. § 1132(a)(3), or, under appropriate circumstances, bring suit on the plan's behalf to remove the fiduciary, *see* 29 U.S.C. § 1109(a). In Congress's view, such alternative

remedies are sufficient to keep fiduciaries from breaches of fiduciary duty that result in no benefit whatsoever to themselves. We possess no authority "to adjust the balance . . . that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263. Accordingly, we affirm the judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:04-1747-18

JAMES LARUE, PLAINTIFF

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED, EMPLOYEES' SAVINGS PLAN, DEFENDANTS

ORDER and OPINION

I. BACKGROUND

This matter is before the court on defendants' motion for judgment on the pleadings. Plaintiff James LaRue filed this action on June 2, 2004, alleging breach of fiduciary duty against defendants DeWolff, Boberg & Associates, Inc. ("DeWolff") and DeWolff, Boberg & Associates Employees' Savings Plan ("Plan"). Plaintiff is a participant in an employee savings plan administered by DeWolff. Plan participants are able to direct plan administrators on how they want their money invested. Plaintiff alleges that in 2001 and 2002 defendants failed to invest his money as he directed, and as a result his interest in the plan was depleted by approximately $150,000. Plaintiff seeks equitable relief for that loss under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(3). Plaintiff also alleges that DeWolff

failed to provide certain information regarding the plan within the time frame required by ERISA, 29 U.S.C. § 1132(c). On February 2, 2005, defendants filed a motion for judgment on the pleadings as to plaintiff's claim for equitable relief under § 1132. Defendants' motion does not address plaintiff's claim for failure to provide information under § 1132(c), or his request for attorneys' fees and costs under § 1132(g).

II. STANDARD OF REVIEW

"When considering a motion for judgment on the pleadings, the same standard as that for a motion to dismiss applies." BET Plant Services, Inc. v. W.D. Robinson Elec. Co., Inc., 941 F. Supp. 54, 55 (D.S.C. 1996). A motion to dismiss should be granted only when "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). When considering dismissal, a plaintiff's well pleaded allegations are taken as true, and the complaint, including all reasonable inferences, is construed liberally in the plaintiff's favor. Republican Party of North Carolina v. Martin, 980 F.3d 943, 952 (4th Cir. 1992).

III. ANALYSIS

Defendants contend that plaintiff's remedy is essentially a demand for money damages, which the relevant ERISA provision prohibits. Plaintiff does not make a specific monetary demand for $150,000. Rather, plaintiff requests the court to award him "make-whole or other equitable relief" as provided in § 1132(a)(3), which allows a participant or beneficiary to bring a civil action "to obtain other appropriate equitable relief" to redress violations of a plan's terms or provisions. Both parties agree that pure money damages may not be awarded under § 1132. Instead,

plaintiff posits his claim as an request for equitable relief. The "equitable relief" described in § 1132 refers to the specific types of relief typically available in equity (i.e, restitution, injunction, mandamus) and not legal remedies available to a court of equity. See Mertens v. Hewitt Assoc., 508 U.S. 248, 257 (1993). Plaintiff implicitly suggests that the court could award $150,000 under a restitution theory. As defendants note, courts have narrowed the availability of restitution under § 1132. Restitution is "appropriate equitable relief" under § 1132

> where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . [F]or restitution to lie in equity, the action generally must eek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-14 (2002). Applying the Supreme Court's language, restitution does not fit the facts of this case. The $150,000 never belonged to plaintiff because it represents potential value, not actual earnings; as such, there is nothing to restore. Nor is the amount in defendants' possession. Awarding plaintiff $150,000 as restitution would impose personal liability on defendants.

Defendants note two recent, analogous cases in which the court dismissed a plaintiff's ERISA claim for restitution. In Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003), plaintiff sought equitable relief against his employee benefits plan after the plan delayed withdrawing his share. Because of the delay plaintiff could not take advantage of a high stock price, and as a result, his share was worth about $80,000 less.

The Fourth Circuit held that the plaintiff's claim could not be considered as equitable restitution because the defendant did not possess any funds that could be "clearly identified as belonging in good conscience to the plaintiff."[1] Rego, 319 F.3d at 145 (citing Great-West, 534 U.S. at 213). Similarly, the disputed sum *sub judice* is neither in the possession of defendant nor belonging to plaintiff.

In Helfrich v. PNC Bank, 264 F.3d 477 (6th Cir. 2001), plaintiff sought equitable relief after the administrator of his 401(k) profit sharing plan failed to follow directions for rolling-over plaintiff's assets into a mutual fund. As a result, plaintiff incurred a loss. Using § 1132, plaintiff sought the difference between the amount he would have had if the administrator had followed directions, and the amount he actually received. The Sixth Circuit rejected this approach, labeling it money damages and not restitution. If the administrator had invested plaintiff's money for its own benefit in an unauthorized, but better performing account, plaintiff could claim that money (and its proceeds) under a theory of restitution. However, the court noted that the plan possessed none of plaintiff's funds or proceeds of those funds; "there is nothing to restore . . . and therefore no basis for restitutionary relief." Helfrich, 267 F.3d at 481. Rather than measure his request in terms of the plan's gain, plaintiff measured it in terms of his losses - the "hallmark of money

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[1] Rego also rejected plaintiff's claim that return of $80,000 would amount to equitable "make-whole" relief. After withdrawing his shares, plaintiff was able to sell them at a high price, ultimately mitigating his damages. Defendant's delay caused plaintiff to lose only $24,500, yet he requested over $80,000. Considering that discrepancy, the court concluded that plaintiff was not really trying to "make himself whole," and rejected his "make-whole" argument. Plaintiff interprets the court's rejection as a repudiation of Rego's claim, but affirmation of the "makewhole" equitable remedy. Regardless, the restitution argument fails on the Great-West principles.

damages." Id. at 482-83. As in Helfrich, the present plaintiff has suffered a loss but defendants have received no gain.

Plaintiff relies on Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994) and Shade v. Panhandle Motor Service Corp., 91 F.3d 133 (4th Cir. 1996) (unpublished) to suggest equity can command money damages for his loss. Neither case is controlling. In Howe, the court approved payments of past-due benefits previously deprived to a group of plan beneficiaries who were fraudulently induced to leave a solvent plan and enter a failing one. The court issued an injunction restoring the plaintiffs to the plan and awarding the benefits they would have received had they remained in the plan. Plaintiffs were awarded money, improperly held by defendants, to which they had a rightful claim. Such is not the scenario in the present case. Howe also carries less weight because it was decided prior to the seminal Supreme Court and Fourth Circuit cases on § 1132's scope (Great-West, 2002; Rego, 2003).

In Shade, the Fourth Circuit approved restitution to a health plan beneficiary who was forced to incur over $100,000 in medical expenses due to the plan's mistake. The court restored plaintiff to the position he would have been in but for the fiduciary's mistake (by putting him back in the plan) and reimbursed him for money he paid out of pocket. Plaintiff's medical expenses represented a gain to defendant; i.e, the benefits were improperly held by defendants ($100,000 in their coffers), but rightfully belonged to plaintiff. Like Howe, Shade s authority is diminished because it was decided prior to both Great-West and Rego.

Finally, plaintiff suggests the court can use the equitable power of reinstatement to order defendants to "process the transaction that plaintiff requested to be processed several years ago." (Pl.'s Rep. Mem. at 7.) Plaintiff is still a member of the plan, so he retains the power to instruct

defendants on his current investments. Processing the transaction as plaintiff originally instructed is not possible without restoring funds to plaintiff's account. Further, plaintiff's authority in support of the court's power to reinstate under § 1132 is not dispositive. In Griggs v. E.I. Dupont De Nemous & Co., 237 F.3d 371 (4th Cir. 2001), plaintiff took early retirement in reliance on his plan's advice regarding the tax implications of electing a lump-sum payment of benefits. When that advice turned out to be faulty, plaintiff incurred a loss and sought an equitable remedy under § 1132. The court remanded the case for further factual development of whether reinstatement to his former job was proper. The lower court was also to determine whether restoration to Griggs' pre-election position was possible. The Fourth Circuit did not express an opinion on whether either remedy was permissible. Regardless, the subsequent holdings in Great-West and Rego supplant Griggs.[2]

Since the hearing, the Fourth Circuit has again addressed the contours of "appropriate" relief under § 1132(a)(3). In Mid-Atlantic Medical Services, LLC v. Sereboff, 407 F.3d 212, 218 (4th Cir. 2005), the court considered a fiduciary's claim for relief against a beneficiary who refused to honor a subrogation provision. The court characterized the fiduciary's claim as permissible equitable restitution because the funds were specifically identifiable, belonged in good conscience to the fiduciary, and were within the possession and control of the beneficiary. Mid-Atlantic, 407 F.3d at 219 (citing Great-West, 534 U.S. at 213). Applying these three

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[2] At the hearing plaintiff cited Schaffer v. Westinghouse Savannah River Co., No. 04-1347, 2005 WL 567812 (4th Cir. March 11, 2005) in support of its position. Schaffer remanded an ERISA case with instructions to the district court to determine whether a pension recalculation was appropriate § 1132(a)(3) relief. The court did not express an opinion on the possible remedy. Schaffer is not as significant to the issue at bar as the guidelines set forth in Great-West, Rego, and Sereboff.

factors, the court must conclude that restitution is not a permissible § 1132(a)(3) remedy in the case at bar.

IV. CONCLUSION

Plaintiff "does not wish for the court to award him any money, but . . . simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty." (Pl.'s Rep. Mem. at 7.) Yet to "properly reflect" that interest, the court would have to transfer money from defendants to plaintiff. Under Supreme Court and Fourth Circuit precedent, restitution is not available since defendants do not possess disputed funds rightly belonging to plaintiff. The disputed sum is a potential gain that was never held by either party. The court cannot hypothesize a means of recovery for plaintiff which is consistent with the guidelines of Great-West, Rego and Sereboff. Therefore, plaintiff is not entitled to any § 1132(a)(3) relief under these set of facts.

For the reasons stated above, it is therefore **ORDERED** that defendants' motion for judgment on the pleadings as to plaintiff's cause of action for "other equitable relief" under § 1132(a)(3) is **GRANTED**.[3]

/s/ DAVID C. NORTON
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

June 23, 2005
Charleston, South Carolina

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[3] This order does not address plaintiff's claim for breach of fiduciary duty or his requests for a statutory penalty under 29 U.S.C. § 1132(c) or for attorney's fees and costs under 29 U.S.C. § 1132(g).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1756

JAMES LARUE, PLAINTIFF-APPELLANT

v.

DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED;
DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED,
EMPLOYEES' SAVINGS PLAN, DEFENDANTS-APPELLEES

SECRETARY OF LABOR, AMICUS SUPPORTING APPELLANT

Filed: August 8, 2006

ORDER

Appellant has filed a petition for rehearing and rehearing en banc in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570 (4th Cir. 2006), and the Secretary of Labor has filed a motion out-of-time for leave to file an amicus brief on appellant's behalf. The court grants the Secretary's motion for leave to file out-of-time, but the petition for rehearing and the petition for rehearing en banc are denied.

With respect to the Secretary's views, the court notes that they are always welcome on any matter in which the Secretary has an interest. The timely submission of those views, however, will assist the court in giving them the

attention they deserve. Initial submission of these views in a petition for rehearing — and an untimely one at that — affords neither the litigants or this court a proper chance to review the case in single, rather than piece-meal, fashion. Thus, the Secretary's belated entry into *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), was a discourtesy both to the parties in that case and to the court.

The same holds true of the even more untimely filing here. Federal Rule of Appellate Procedure 29(e) directs the filing of an amicus brief "no later than 7 days after the *principal* brief of the party being supported is filed." Fed. R. App. P. 29(e) (emphasis added). The term "principal brief" would appear to refer to the lead brief filed by a party in anticipation of argument (either before a panel or the en banc court) and not to something such as a reply brief or petition for rehearing. The language of that rule sets forth no exceptions. While a court is not precluded from granting leave to file an amicus brief in other circumstances, *see id.* advisory committee's note, waiting until a petition for rehearing has been filed is a disfavored litigation tactic and fails to serve the litigants' interest in having all views considered thoroughly at the initial briefing and argument stage. While it may suit the agency's convenience to troll for panel results to which it takes exception, such a practice is not consistent with the orderly and conscientious disposition of claims in an appellate court. *See* Sup. Ct. R. 44(5) ("The Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing."); D.C. Cir. R. 35(f) ("No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.").

Having served notice that untimely submissions will henceforth be disfavored, the court will out of respect for the Secretary address its views in the instant case. The Department of Labor concedes that *LaRue* must be "read

broadly" to give rise to the possible difficulties it envisions. Br. at 1. To begin with, the problems supposed by the Department are at best speculation: the Secretary says only that they "could" possibly arise. *Id.* at 7. The Secretary, moreover, offers no explanation for and quotes no language from the opinion as to why the case must be "read broadly." To the contrary, *LaRue* involves a single plaintiff who sought to recover for an individual loss; indeed, LaRue did not even allege a "loss to the plan," but only to his "interest in the plan." J.A. 7-9. It is, therefore, the Secretary's position, rather than the panel's, that is the broad one — for it stretches the ERISA statute unacceptably. Neither the text of Section 502(a)(2) nor Supreme Court precedent contemplate a remedy for individual, rather than plan, losses. To adopt the Secretary's view, however, would necessarily transform every purely individual claim for breach of fiduciary duty into a "plan loss." Such an expansive view of fiduciary liability would lead to its own parade of horribles, a parade that Congress refused to countenance. *See Pilot Love Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

The Secretary's view — that a purely individual claim that bears any legal relationship to a plan inures to the benefit of that plan — is contrary to the plain text of the statute. Section 502(a)(2) incorporates Section 409 which provides that a fiduciary who breaches a plan duty "shall be personally liable to make good to such plan *any losses to the plan* resulting from each such breach, and to restore to *such plan* any profits of such fiduciary which have been made *through use of assets of the plan* by the fiduciary." 29 U.S.C. § 1109(a) (2000) (emphasis added). As the Supreme Court has explained: "[T]he entire text of § 409 persuades us that Congress did not intend that section to authorize any relief *except for the plan itself.*" *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (emphasis added). If Congress meant to authorize individual damages claims under § 502(a)(2), it had only to say so. Instead, the text

emphasizes the precise nature of the remedy provided by Congress: a remedy restricted to plan losses. Furthermore, ERISA is a "comprehensive and reticulated statute," *id.* at 146, it implements Congress' various "policy choices," *Dedeaux*, 481 U.S. at 54, and courts should therefore be "especially reluctant to tamper with the enforcement scheme embodied in the statute . . . by extending remedies not specifically authorized by its text." *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation and alteration omitted).

The Secretary's view is thus inconsistent with the Supreme Court's decision in *Russell*. The *Russell* Court held that § 502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole, not on their own behalf. 473 U.S. at 140, 144; *see Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) ("[§ 502(a)(2)] does not provide a remedy for individual beneficiaries."). As the Supreme Court explained, ERISA's fiduciary duty provisions are primarily concerned with protecting the integrity of the plan, which in turn protects all beneficiaries, rather than remedying individual wrongs. *Russell*, 472 U.S. at 141. As a result, a § 502(a)(2) claim must "be brought in a representative capacity on behalf of the plan as a whole." *Id.* at 141 n.9. The Department of Labor, however, fails to explain how its overly broad reading of "loss to the plan" — to include entirely individual claims — can possibly be squared with *Russell*'s representative capacity requirement. Here, LaRue seeks to recover money damages to which he believes he is individually entitled — such an action is in no sense "representative."

The Secretary's atextual reading of Section 502(a)(2) would also strip *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life and Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), of any real significance. In those cases, the Supreme Court refused to read Section 502(a)(3)'s language "appropriate equitable relief" to

authorize money damages, because such a construction would undermine Congress' carefully crafted remedial scheme. Indeed, ERISA provides not one, but two, bases for individual beneficiaries like LaRue to enforce the terms of a plan, but — unlike Section 502(a)(2) — neither of these provisions permits the recovery of money damages. *See* 29 U.S.C. §§ 1132(a)(1)(B),(a)(3). To read, as the Secretary suggests we should, § 502(a)(2) to authorize the very sort of individual damages barred by the Supreme Court in *Mertens* and *Knudson*, would render § 502(a)(3)'s limitation on monetary relief a dead-letter. It would also deprive of all meaning the careful distinction Congress drew between plan remedies in § 502(a)(2), and individual remedies in §§ 502(a)(1) and (a)(3).

According to the Secretary, "[*LaRue*] creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits." Br. at 11. That assertion overlooks the actual holdings of the cases cited by the Secretary; it also ignores the decisions of *other* courts of appeals with which the Secretary's interpretation of § 502(a)(2) conflicts. To begin with, each case cited by the Department involved a subset of plan beneficiaries or participants that alleged plan losses. Not a single case involved, as here, an individual plaintiff, much less one who failed to allege a "loss to the plan" as required by Section 502(a)(2).

In *In re Schering-Plough Corp. ERISA Litig.*, for example, the Third Circuit held only that where plaintiffs alleged that *the Plan* suffered significant losses" and requested that fiduciaries "make good *to the Plan* the losses *to the Plan*," they need not "seek[ ] to recover for *all* plan participants allegedly injured by the breach." 420 F.3d 231, 234, 235 (3d. Cir. 2005) (emphasis added). Indeed, the Third Circuit distinguished the very situation presented here: one in which a single plaintiff seeks "to recover damages on his or her own behalf." *Id.* at 239. And, the Secretary's assertions

notwithstanding, Br. at 14, the Third Circuit *did* attach significance to the fact that plaintiffs filed a class action on behalf of a number of plan participants, distinguishing *Russell* on precisely that ground. *Id.* at 241.

Likewise, in *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995), the Sixth Circuit concluded that a subclass of plan participants could sue where the remedy sought by plaintiffs "would benefit the plan as a whole and . . . cure any harm the plan had suffered." Indeed, the *Kuper* court noted that the Sixth Circuit had "repeatedly held that ERISA does not permit recovery by an individual who claims a breach of fiduciary duty." *Id.* at 1452-53. (collecting cases). Similarly, in *Milofsky v. Am. Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006), a subset of participants sought "to recover losses to [American Airlines' 401K] $uper $aver Plan." As for *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003), the Seventh Circuit specifically noted that — in contradistinction to § 502(a)(3), the appropriate vehicle for individual relief — § 502(a)(2) requires a loss to the plan. The cases cited by the Secretary thus stand only for the limited proposition that liability under § 502(a)(2) is not limited to losses that accrue to *all* plan participants — it is, however, limited to plan losses.

Indeed and ironically, it is the Secretary's overly broad view of the term "losses to the plan" that creates the circuit split. A number of courts of appeals have stated that individual loss is not cognizable under § 502(a)(2). In *Strom v. Goldman, Sachs & Co.*, for example, the Second Circuit held that an individual plaintiff "cannot proceed under Section 502(a)(2) because it affords no remedies to individual beneficiaries." 202 F.3d 138, 149 (2d Cir. 1999), *abrogated on other grounds by Knudson*, 534 U.S. at 214-15; *see Matassarin v. Lynch*, 174 F.3d 549, 566 (5th Cir. 1999) (affirming grant of summary judgment under Section 502(a)(2) because plaintiff's allegations "concern only her

individual account"); *see also Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999) ("Under ERISA, damages for breach of fiduciary duty inure to the benefit of the plan as a whole rather than to individuals."); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) ("[P]laintiffs failed to prove a loss *to the plan* as required by 29 U.S.C. § 1109(a)") (emphasis in original); *Parker v. BankAmerica Corp.*, 50 F.3d 757, 768 (9th Cir. 1995) ("Any recovery for a violation of section 1132(a)(2) must be on behalf of the plan as a whole, rather than inuring to individual beneficiaries."); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991) (same); *Tregoning v. American Community Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993) ("§ 1109(a) provides relief only for a plan and not for individual participants."); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d. Cir. 1993) ("*Russell* . . . bars plaintiffs from suing under Section 502(a)(2) because plaintiffs are seeking damages on their own behalf, not on behalf of the Plan."); *Physicians HealthChoice, Inc. v. Trustees of Auto. Employee Ben. Trust*, 988 F.2d 53, 54 (8th Cir. 1993) ("The Supreme Court has construed [§ 1109(a)] literally . . . that section [does not] 'authorize any relief except for the plan itself.'") (quoting *Russell*, 472 U.S. at 144).

In ERISA, Congress sought to provide fair and generous remedies for plan participants without imposing ruinous personal liability on plan fiduciaries. That balance pervades the statute, and it is not for us to readjust it. With respect, we think the Secretary's view does recalibrate the balance, and we do not possess authority to modify plain statutory text, several Supreme Court decisions, and the corpus of circuit law on the subject. If the Department believes fiduciaries should face personal liability for every wrong alleged by individual beneficiaries, even in the absence of personal profit or misuse of plan assets, it will have to seek a forum other than this court.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Traxler and Judge Williams (USDJ,ED/VA).

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:04-1747-DCN

JAMES LARUE, PLAINTIFF

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED, EMPLOYEES' SAVINGS PLAN, DEFENDANTS

ORDER OF JUDGMENT

On June 23, 2005, the court issued an order granting the Defendants' motion for judgment on the pleading with regard to the Plaintiff's request for equitable relief under E.R.I.S.A. for an alleged breach of fiduciary duty on the part of the Defendant DeWolff Boberg & Associates. As the court noted in its' order of June 23, 2005, that order did not pertain in any way to a separate claim by the Plaintiff in his complaint which sought a statutory penalty for an alleged failure to provide requested information under E.R.I.S.A. and related attorney's fees and costs. The Plaintiff has advised the Court that he will abandon his remaining claim for statutory penalties and related attorney's fees and costs and that he does not wish to burden the Court further with that particular claim. Plaintiff has asked the Court to dismiss that claim with prejudice in light of his abandonment of that particular claim only and the Defendants consent to such

dismissal. Plaintiff has advised the Court that he is only abandoning the statutory penalty claim and the related claim for fees and costs and that he in no way intends to abandon any rights to appeal the issues addressed by the Court's order of June 23, 2005. Because the Plaintiff does wish to abandon his claim for a statutory penalty and related attorney's fees and costs and because the Defendants consent to such dismissal with prejudice, the Court does dismiss that claim with prejudice. However, upon dismissal Plaintiff does retain all rights to appeal or make a motion on the issues raised by the Court's June 23, 2005 order. The effect of this order and the Court's prior order of June 23, 2005 is such that the Plaintiff's entire action is dismissed with prejudice and judgment shall be entered in favor of the Defendants.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that the Plaintiff's complaint is dismissed with prejudice and judgment shall be entered in favor of the Defendants. Each party shall bear its own costs and attorneys fees.

AND, IT IS SO ORDERED.

/s/ DAVID C. NORTON
THE HONORABLE DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

Date: July 5, 2005

APPENDIX E

1. 29 U.S.C. 1002 provides in pertinent part:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant–

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and

as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * * * *

2. 29 U.S.C. 1104(a)(1)(B) provides in pertinent part:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

* * * * *

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * * *

3. 29 U.S.C. 1109 provides:

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or

remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

4. 29 U.S.C. 1132(a) provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought–

* * * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

(3)

No. 06-856

FILED
JAN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether § 502(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2), permits a participant to bring an action in a non-representative capacity to recover monetary losses specific to his individual account in a defined contribution plan due to an alleged fiduciary breach ("the § 502(a)(2) Question").

2. Whether § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits a participant to bring an action for money damages characterized as a claim for "appropriate equitable relief" ("the § 502(a)(3) Question").

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent DeWolff, Boberg & Associates, Inc. is neither a publicly-held corporation nor other publicly-held entity. Respondent does not have any parent corporations, and no publicly-held corporation or other publicly-held entity owns 10% or more of Respondent's stock.

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IN THE

Supreme Court of the United States

No. 06-856

JAMES LARUE,

Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

The court of appeals concluded that Petitioner's § 502(a)(2) claim should be rejected because such actions must be brought in a representative capacity or on behalf of the plan to benefit the plan as a whole, rather than to benefit solely an individual plan participant whose alleged loss is specific to his individual account. This conclusion is a straightforward and unremarkable application of controlling precedent, and presents no conflict among the courts of appeals. Moreover, the court of appeals' decision should not influence the outcome of litigation, cited in the petition, regarding the scope of Section 502(a)(2) in cases involving alleged fiduciary breaches affecting a substantial number of plan participants. Accord-

ingly, the § 502(a)(2) Question does not warrant review by this Court. The court of appeals' decision rejecting Petitioner's § 502(a)(3) claim likewise does not warrant review by this Court. The Fourth Circuit's conclusion that Petitioner's complaint sought money damages not available under § 502(a)(3) is supported by controlling precedent, and there is no conflict among the courts of appeals on whether money damages constitute appropriate equitable relief where there is no unjust enrichment on the part of the plan fiduciary. Petitioner had an alternative remedy, in that he could have sought injunctive relief to redress the alleged breach of fiduciary duty. Neither question raised by the petition is of exceptional importance. Accordingly, the petition should therefore be denied.

COUNTERSTATEMENT OF THE CASE

DeWolff, Boberg & Associates, Incorporated ("DBA" or "Respondent") is a management consulting firm organized under the laws of the State of South Carolina. Respondent administers, and is thus a fiduciary of, the DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan ("the Plan"), established to provide participating employees with an opportunity to save for retirement on a tax-deferred basis. The Plan is a retirement plan subject to regulation under ERISA and the Internal Revenue Code, commonly known as a 401(k) plan.

James LaRue ("Petitioner") has participated in the Plan since 1993. According to the terms of the Plan, participants in the Plan are permitted to direct the investment of their contributions in accordance with the procedures and requirements established by the Plan Administrator or its agents. As DBA's Summary Plan Description states:

> [The participant] will be able to direct the investment of [his/her] entire interest in the Plan. The Administrator will provide [the participant] with information on the

> investment choices available to [him/her], the frequency with which [the participant] can change [his/her] investment choices and other information. Periodically, [the participant] will receive a benefit statement that provides information on [his/her] account balance and [his/her] investment returns . . . To the extent [the participant] [does] not direct the investment of [his/her] Plan benefits, the Trustee or another designated person will be responsible for the investment of all assets held by the Plan. The Trustee or another designated person will make investment decisions that are made in the best interests of [the participant] and other Plan participants.

Br. Opp'n App. 19a.

Petitioner alleges that in 2001 and 2002, he requested that certain changes be made with respect to his then-current and future investments in the Plan, but that these changes were not implemented. In 2004, he brought a civil action for breach of fiduciary duty against Respondent and the Plan for allegedly failing to follow his investment directions. Petitioner's complaint claimed that due to the breach, his interest in the Plan had been depleted by approximately $150,000. In the complaint, Petitioner sought appropriate make whole or other equitable relief pursuant to § 502(a)(3). Br. Opp'n App. 4a.

Respondent filed a Rule 12(c) motion for judgment on the pleadings, asserting that Petitioner's requested remedy was not available under § 502(a)(3).[1] The district court agreed

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[1] In a memorandum filed with the district court, Petitioner effectively conceded that the complaint inappropriately sought recovery of compensatory damages in excess of an amount that could fairly be claimed as "make whole" relief. Petitioner sought to cure the defective pleading by suggesting that the "[$150,000.00] figure was intended merely to orientate the court as to what Plaintiff believed the breach of fiduciary duty cost him at the time he filed his complaint." Br. Opp'n App. 47a. According to Petitioner, the actual loss to his interest in the Plan was actually less than the amount mentioned in the complaint. *Id.* n.5.

and dismissed the case with prejudice. Pet. App. 15a-21a, 30a-31a. Petitioner appealed the case to the United States Court of Appeals for the Fourth Circuit. After briefing and oral argument, the Fourth Circuit affirmed the district court's opinion. Pet. App. 1a-14a. Petitioner filed a timely petition for rehearing and rehearing *en banc*, and the United States Secretary of Labor filed an *amicus curiae* brief in support of the rehearing petition. The Fourth Circuit rejected the arguments made by the Secretary, and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a.

The petition for a writ of certiorari next followed.

REASONS FOR DENYING THE PETITION

I. THE § 502(a)(2) QUESTION DOES NOT WARRANT REVIEW.

Section 502(a)(2) of ERISA permits "a participant, beneficiary or fiduciary" to bring a civil action for "appropriate relief under section 1109 of this title," also known as § 409 of ERISA. Section 409 provides:

> any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . .

29 U.S.C. § 1109.

Petitioner's new counsel implies that, in the district court, Petitioner invoked Section 502(a)(2) by alleging a breach of fiduciary duty under ERISA § 409 and "sought that respondents 'make good to [the] plan' the losses that resulted." Pet. at 8. This implication is misleading; Petitioner's complaint

sought relief exclusively under § 502(a)(3). Br. Opp'n App. 4a. Petitioner's § 502(a)(2) claim was made for the first time on appeal. After suggesting this claim may have been waived, the Fourth Circuit addressed the § 502(a)(2) argument, concluding that this claim lacked merit in any event.[2] Pet. App. 5a-7a.

The § 502(a)(2) Question does not warrant review by this Court. The court of appeals' determination of the § 502(a)(2) Question is a straightforward application of this Court's settled interpretation of the relevant statutory language. Moreover, the court of appeals' determination of the § 502(a)(2) Question does not create a circuit conflict. Finally, the § 502(a)(2) Question is not of exceptional importance because this case involves a single plan participant seeking recovery for an alleged loss to the value of his individual plan account. The court of appeals' decision has no broader ramifications.

A. The court of appeals' determination of the § 502(a)(2) Question correctly applied this Court's settled construction of the statutory language.

This Court has held that an action brought under § 502(a)(2) alleging a breach of fiduciary duty under § 409 can only be brought in circumstances where the plaintiff seeks to recover losses sustained by the plan as a whole. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). As this Court explained in *Russell*, "[a] fair contextual reading of [ERISA

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[2] The United States Secretary of Labor, in her *amicus curiae* brief to the Fourth Circuit in support of the petition for rehearing and rehearing *en banc*, noted that she "takes no position on whether the section 502(a)(2) argument was waived or on the merits of [Petitioner's] claims." Brief of United States Secretary of Labor as *Amicus Curiae* in Support of Petition for Rehearing and Rehearing *En Banc* in *LaRue v. DeWolff, Boberg & Associates, Inc. et al.*, 450 F.3d 570 (July 12, 2006) ("DOL Br.").

§ 409] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.*

The court of appeals' determination of the § 502(a)(2) Question follows *Russell*. In rejecting the petition for rehearing, the Fourth Circuit observed:

> The *Russell* Court held that § 502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole, not on their own behalf . . . As the Supreme Court explained, ERISA's fiduciary duty provisions are primarily concerned with protecting the integrity of the plan, which in turn protects all beneficiaries, rather than remedying individual wrongs. *Russell*, 472 U.S. at 141. As a result, a § 502(a)(2) claim must 'be brought in a representative capacity on behalf of the plan as a whole.' *Id.* at 141 n.9. The Department of Labor, however, fails to explain how its overly broad reading of 'loss to the plan'—to include entirely individual claims—can possibly be squared with *Russell*'s representative capacity requirement. Here, LaRue seeks to recover money damages to which he believes he is individually entitled—such an action is in no sense 'representative.'

Pet. App. 25a.

Petitioner's claim is strictly individual in nature, seeking damages solely for his own benefit. He does not bring this action on behalf of the plan or on behalf of a class of plan participants. Nor does Petitioner allege a breach of fiduciary duty affecting any other plan participant. The Fourth Circuit correctly decided that this claim is precluded by *Russell*. Moreover, to interpret § 502(a)(2) to allow recovery of alleged losses suffered by individual plan participants would effectively obliterate the distinction Congress made in specifically providing for plan remedies in § 502(a)(2) and for individual remedies in § 502(a)(3), thus upsetting the "inter-

locking, interrelated, and interdependent remedial scheme" Congress carefully crafted in enacting the ERISA statute. *See Russell*, 473 U.S. at 146.

B. The court of appeals' determination of the § 502(a)(2) Question does not create a circuit conflict.

Petitioner suggests, almost in passing, that the court of appeals' determination of the § 502(a)(2) Question creates a conflict with the holdings of the Third, Fifth, Sixth, and Seventh Circuits. Pet. at 16. Petitioner is incorrect. As the court of appeals explained in its Order rejecting the argument of the Secretary of Labor:

> [this] assertion overlooks the actual holdings of the cases cited by the Secretary...To begin with, each case cited by the Department involved a subset of plan beneficiaries or participants that alleged plan losses. Not a single case involved, as here, an individual plaintiff, much less one who failed to allege a 'loss to the plan' as required by Section 502(a)(2).

Pet. App. 26a.

The Fourth Circuit's conclusion on this point is demonstrably correct. The decisions cited in the petition are readily distinguishable from Petitioner's situation in that they involve actions brought on behalf of a class of similarly-situated participants and/or on behalf of the plan itself, in factual scenarios where the alleged fiduciary breach involved misbehavior affecting a considerable segment of plan participants. For instance, *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005), involved a class action on behalf of a number of participants alleging the plan fiduciary breached its duties by offering company stock as a plan alternative even though the company's stock price was wrongfully inflated, and by engaging in other types of broad fiduciary misconduct. The plaintiffs alleged plan losses due to the drop in value of

the company's stock. *Id.* at 241. In concluding that the plaintiffs properly stated a claim under § 502(a)(2), the Third Circuit expressly noted that the suit was filed as a class action, unlike *Russell*. *Id.*

Likewise, in *Milofsky v. American Airlines, Inc.*, 442 F.3d 311 (5th Cir. 2006), the court concluded that the plaintiffs, through a suit filed on behalf of a subset of participants, could sue to recover losses to the plan. *Id.* at 313. The plaintiffs in *Milofsky* brought an action under § 502(a)(2), in a representative capacity on behalf of a subset of plan participants, alleging broad fiduciary breach in failing to transfer the balance of their accounts from one savings plan to another after their employer had been acquired by American Airlines. 404 F.3d 338, 340 (5th Cir. 2005), *vacated and remanded*, 442 F.3d 311 (5th Cir. 2006). *See also Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003) (concluding that participants who brought an action on behalf of a class of participants could bring suit for the benefit of the plan, where the employer's failure to diversify assets in the employee stock ownership plan caused plan losses); *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995) (concluding that a subclass of plan participants could bring a class action seeking a remedy that would benefit the plan as a whole, where losses to the employee stock ownership plan resulted from the fiduciary's delay of a trust-to-trust transfer of plan assets after a company division sale).

While these cases hold that a subclass of plan participants may bring an action under § 502(a)(2), they suggest that such relief can only be pursued where the alleged fiduciary breach affects a significant number of participants. This case, by contrast, involves an alleged fiduciary breach that affects only Petitioner as an individual participant. There is no circuit conflict created by the court of appeals' determination of the § 502(a)(2) Question.

C. The § 502(a)(2) Question is not an issue of exceptional importance.

Petitioner argues that the court of appeals' interpretation of § 502(a)(2) impermissibly limits the remedies available to individual plan participants alleging breach of fiduciary duty. Pet. at 10-11. Petitioner is incorrect. As the court of appeals noted, its decision "hardly leaves a plan participant or beneficiary in plaintiff's position without recourse. He could, for example, . . . under appropriate circumstances, bring suit on the plan's behalf to remove the fiduciary . . . in Congress's view, such [an] alternative remed[y] [is] sufficient to keep fiduciaries from breaches of fiduciary duty that result in no benefit whatsoever to themselves." Pet. App. 13a-14a. Moreover, Petitioner could have sought individual relief under § 502(a)(3), which provides for certain "appropriate equitable relief." As explained below, Petitioner made the tactical decision not to seek appropriate equitable relief, and chose instead to sue for money damages. Accordingly, nothing in the court of appeals' decision would deprive an individual plan participant of a remedy under ERISA in the event of a breach of fiduciary duty. There is certainly nothing extraordinary about Congress' decision not to permit an individual cause of action for damages under Section 502(a)(2). As such, Petitioner's claim raises no issue of exceptional importance.

Despite the individualized focus of his complaint, Petitioner contends that the § 502(a)(2) Question is exceptionally important because of the possible effect the Fourth Circuit's decision might have on plan participants seeking relief for breach of fiduciary duty affecting a substantial number of plan participants. Pet. at 10-11. The court of appeals' decision is, of course, limited to the unique factual circumstances in this case and is unlikely to result in the broad consequences the Petitioner posits. Although the Secretary of Labor also hypothesized collateral consequences in her *amicus* brief

supporting the petition for rehearing, *see* DOL Br. at 1, the Secretary's larger concern clearly focuses on the ability of a *group* of plan participants to bring a § 502(a)(2) claim to recover monetary losses to the plan, as evidenced by her argument that the Fourth Circuit's decision will be detrimental if it is "read broadly." *Id.* But the court of appeals' decision gives no reason for the Secretary's disquietude. In its subsequent opinion, the court of appeals expressly rejected those arguments:

> The Department of Labor concedes that *LaRue* must be 'read broadly' to give rise to the possible difficulties it envisions. Br. at 1. To begin with, the problems supposed by the Department are at best speculation: the Secretary says only that they 'could' possibly arise. *Id.* at 7. The Secretary, moreover, offers no explanation for and quotes no language from the opinion as to why the case must be 'read broadly'. . . . It is, therefore, the Secretary's position, rather than the panel's, that is the broad one—for it stretches the ERISA statute unacceptably . . . To adopt the Secretary's view, however, would necessarily transform every purely individual claim for breach of fiduciary duty into a 'plan loss.' Such an expansive view of fiduciary liability would lead to its own parade of horribles, a parade that Congress refused to countenance.

Pet. App. 23a-24a.

This case involves an individual plan participant seeking to recover an alleged loss in his individual plan account on the basis of a fiduciary breach directed solely at him. Petitioner's suggestion that his claim is intended to benefit the whole plan is without merit; the complaint was not brought in a representative capacity on behalf of other participants or on behalf of the plan, as required by this Court's decision in *Russell*, 473 U.S. at 141 n.9 ("a § 502(a)(2) claim must 'be brought in a representative capacity on behalf of the plan as a whole'"). *See Coan v. Kaufman*, 457 F.3d 250, 259 (2d Cir.

2006) (affirming the district court's decision rejecting a former plan participant's § 502(a)(2) claim for failing to bring the action in a representative capacity on behalf of the plan).

Absent the presentation of a broad-based legal issue, and as a result of Petitioner's focus on individualized rather than plan-wide recovery, this case is a singularly inappropriate vehicle to address the question presented in the petition regarding the scope of Section 502(a)(2) in cases involving an alleged fiduciary breach affecting a substantial percentage of plan participants.

II. THE § 502(a)(3) QUESTION DOES NOT WARRANT REVIEW.

Section 502(a)(3) authorizes a plan participant, beneficiary, or fiduciary to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other *appropriate equitable relief*." 29 U.S.C. § 1132(a)(3) (emphasis added). In construing this provision, the Court has been careful not to infer causes of action under ERISA "since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (quoting *Russell*, 473 U.S. at 146-47) (emphasis in original). In determining the type of equitable relief available under § 502(a)(3), this Court has limited the provision to "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256 (emphasis in original). Money damages, on the other hand, are "the classic form of *legal* relief," and as such are not available under Section 502(a)(3) of ERISA. *Id.* at 255 (emphasis in original).

Petitioner contends that, since this Court's ruling in *Mertens*, two circuit splits have emerged concerning the scope of

§ 502(a)(3). Pet. at 17-19. He argues that the first circuit split involves whether money losses can be recovered under § 502(a)(3) for fiduciary breach, relying chiefly on two appellate court decisions issued before *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). Pet. at 17-18 (citing to *Strom v. Goldman, Sachs, & Co.*, 202 F.3d 138 (2d Cir. 1999) and *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000)). *Great-West* effectively eliminated any conflict over this issue by severely undercutting the rationale of the Second Circuit's decision in *Strom*. *See Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2286 (U.S. May 22, 2006) (No. 05-731).

The second circuit split alleged by Petitioner is "whether—and under what circumstances—lawsuits filed by plan fiduciaries seeking monetary reimbursement of advanced medical expenses from plan participants or beneficiaries pursuant to a contractual reimbursement provision were permissible under § 502(a)(3)." Pet. at 18. That issue is obviously irrelevant to this case, and, in any event, was largely resolved by this Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006), which concluded that a plan fiduciary could obtain monetary reimbursement of paid medical bills from the plan participant and beneficiary if the fiduciary sought identifiable funds within the participant's possession and control. *Id.* at 1873-74.

Petitioner argues that the § 502(a)(3) Question is an exceptionally important and recurring issue that has been raised by the Secretary of Labor. Pet. at 20. The Secretary did not request reconsideration of the § 502(a)(3) Question in her *amicus* filing in the court of appeals, suggesting no institutional concern regarding the court of appeals' determination of this issue. Petitioner instead relies on the Secretary's earlier *amicus curiae* filing in *Goeres v. Charles Schwab & Co., Inc. et al.*, 2004 WL 2203474 (N.D. Cal. 2004), and other *amicus* briefs submitted by the Secretary at the court of appeals level addressing the scope of equitable relief

available under § 502(a)(3). Pet. at 20-21. This Court denied the petition for a writ of certiorari in two of these cases. *See Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2286 (U.S. May 22, 2006) (No. 05-731); *Callery v. U. S. Life Ins. Co. in City of New York*, 392 F.3d 401 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 333 (U.S. Oct 03, 2005) (No. 04-1366).

In any case, Petitioner misreads this Court's decisions on the scope of § 502(a)(3). As this Court made clear in *Mertens*, the modifier "equitable" must be read to limit the type of relief available under this subsection, notwithstanding examples of monetary recovery that may have been available in a court of equity for breach of trust. *See* 508 U.S. at 257-58. This Court reaffirmed the limited scope of equitable relief available under § 502(a)(3) in *Great-West*. These holdings were not disturbed by this Court's most recent decision in *Sereboff*. 126 S. Ct. at 1873 (". . . we construed the [§ 502(a)(3)] provision to authorize 'only categories of relief that were *typically* available in equity,' and thus rejected a claim that we found sought 'nothing other than compensatory damages'" (citing *Mertens*, 508 U.S. at 255-56) (emphasis in original)).

The court of appeals correctly concluded that Petitioner could not succeed on an equitable restitution theory under § 502(a)(3). As the court explained, Petitioner cannot recover under an equitable restitution claim because he "does not allege that funds owed to him are in defendants' possession, but instead that these funds never materialized at all. He therefore gauges his recovery not by the value of defendants' nonexistent gain, but by the value of his own loss—a measure that is traditionally legal, not equitable." Pet. App. 10a (citing *Sereboff* and *Great-West*). Furthermore, Petitioner is mistaken in suggesting that he had no remedy in these circumstances. As the court of appeals observed, Petitioner could have sought injunctive relief "compelling compliance with his investment instructions . . . ." Pet. App. 13a.

Finally, Petitioner asserts that the § 502(a)(3) Question was "left open" in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004). Pet. at 22-23. Petitioner is incorrect. *Aetna* did not address the scope of equitable relief under § 502(a)(3), but rather dealt with whether the plaintiffs' state-court suits against their health maintenance organizations were pre-empted by ERISA. 542 U.S. at 204. And the Court's decision shows that the limits of Section 502(a)(3) are well understood. Thus, *Aetna* neither opened any doors to the § 502(a)(3) Question nor challenged this Court's well-established decisions in both *Mertens* and *Great-West*.

To the extent the § 502(a)(3) Question is presented in other circumstances, it is a matter for Congress to resolve. As the court of appeals commented:

> Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of 'ensuring fair and prompt enforcement of rights under a plan' on the one hand and 'encourag[ing] . . . the creation of such plans' on the other. *Aetna Health* [*v. Davila*], 542 U.S. at 215 (internal quotation marks omitted). It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this—where there was no unjust enrichment, unlawful possession, or self-dealing—would seriously deter plan formation and the service of qualified individuals and institutions as fiduciaries. Compare, *e.g.*, *Mertens*, 508 U.S. 262-63 (discussing negative effects of expansive ERISA liability).

Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 22, 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

[Filed JUN 2, 2004]

Case No. 2:04-1747-18

JAMES LARUE,

Plaintiff,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., and THE DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN,

Defendants.

COMPLAINT

Plaintiff, complaining of the Defendant herein, would respectfully show unto this Honorable Court as follows:

I

Plaintiff is a citizen and resident of the State of Texas.

II

Defendant DeWolff, Boberg & Associates, Inc. (hereinafter "DeWolff") is a corporate entity organized and existing pursuant to the laws of one of the states of the United States and which does business and owns property in Charleston, South Carolina.

III

Defendant The DeWolff, Boberg & Associates Employees' Savings Plan (hereinafter "the plan") is organized as an E.R.I.S.A. governed retirement plan and is a legal entity

capable of being sued pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(d).

IV

In this matter, the Plaintiff alleges a breach of fiduciary duty pursuant to E.R.I.S.A. 29 U.S.C.S. § 1001 *et. seq.* and this court has jurisdiction to hear this matter based upon the involvement of a federal question.

V.

Attached hereto as exhibit A is the plan document for the Defendant plan. The Defendant plan is a retirement plan which is governed by E.R.I.S.A. and in which certain eligible employees of DeWolff, Boberg & Associates are entitled to participate.

VI.

The Defendant DeWolff is the plan administrator of the plan.

VII.

Plaintiff is a participant in the plan and has continuously been since prior to calendar year 2001.

VIII.

According to the terms of the plan, participants such as the Plaintiff have a right to periodically direct the plan, by and through its' delegated administrators, as to how the participant wants his money invested.

IX.

In calendar year 2001 and 2002, the Plaintiff advised the Defendant, by and through its' delegated agents or administrators to invest his money a certain way. Despite the Plaintiff's instructions to the plan, by and through its' agents and administrators, the plan did not invest Plaintiff's money as he directed.

X

Additionally, Plaintiff requested certain information from the Defendant plan which was not provided.

XI.

Plaintiff alleges a breach of fiduciary duty hereinbelow and under prevailing Fourth Circuit authority, Plaintiff is not required to exhaust administrative remedies pertaining to a breach of fiduciary duty claim under E.R.I.S.A. (See Smith v. Sydnor, 184 F.3d 356 (4th Cir. 1999).

FOR A FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty Pursuant to E.R.I.S.A. 29 U.S.C.S. § 1104, § 1132(a)(3) and Other Portions of E.R.I.S.A. 29 U.S.C.S. & 1001 et. seq.)

XII.

Plaintiff incorporates all prior allegations herein, where not inconsistent, as if fully set forth herein.

XIII.

The Defendant DeWolff is the plan administrator of the subject plan and is responsible for the plan's workings and administrative details. DeWolff is responsible for seeing to it that the terms of the plan are adhered to by both participants and the entities hired by DeWolff to administer the plan. DeWolff is a fiduciary of the subject plan for the aforementioned purposes.

XIV.

On at least two occasions, the Plaintiff directed the plan, by and through its' appointed agents and administrators, to invest his money and contributions a certain way, but the plan and its' administrator, DeWolff, failed to invest Plaintiff's money as directed and as a direct and proximate result, the Plaintiff's interest in the plan has been depleted approxi-

mately $150,000.00. Additionally, Plaintiff has requested certain information from DeWolff, which DeWolff is required to provide pursuant to E.R.I.S.A., but which DeWolff failed to provide within the time required by E.R.I.S.A.

XVIII.

DeWolff has breached its' fiduciary duties to the Plaintiff in the foregoing regards and Plaintiff respectfully requests that the court declare that DeWolff has breached its' fiduciary duties pursuant to E.R.I.S.A. 29 U.S.C.S. § 1104, § 1132(c), § 1022, and § 1024 and otherwise as the court may deem appropriate. Plaintiff respectfully requests that the court also award Plaintiff "make whole" or other equitable relief as allowed by E.R.I.S.A. 29 U.S.C.S. § 1132(a)(3) and that the court award the Plaintiff attorney's fees and costs pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(g).

WHEREFORE, having fully stated his claim against the Defendants, Plaintiff respectfully prays for (1) a declaration from the court that the Defendant has breached its' fiduciary duty pursuant to E.R.I.S.A. 29 U.S.C.S. § 1001 *et. seq.*, (2) for appropriate "make whole" or other equitable relief pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(a)(3), (3) for a statutory penalty for failure to provide information Plaintiff requested pursuant to E.R.I.S.A.. 29 U.S.C.S. § 1132(c), (4) for attorney's fees and costs pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(g), and (4) for such other and further relief as the court deems just and proper.

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DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN

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DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN

SUMMARY PLAN DESCRIPTION

INTRODUCTION TO YOUR PLAN

We have adopted DeWolff, Boberg & Associates Employees' Savings Plan ("Plan") to provide you with the opportunity to save for retirement on a tax-deferred basis. This Summary Plan Description ("SPD") contains valuable information regarding when you may become eligible to participate under the Plan, your Plan benefits, your distribution options, and many other features of the Plan. You should take the time to read this SPD to get a better understanding of your rights and obligations under the Plan.

This SPD is written in a non-technical manner using a question and answer format. We have attempted to answer most of the questions you may have regarding your benefits under the Plan. If this SPD does not answer all of your questions, please contact the Administrator. The name and address of the Administrator can be found in the Article of this SPD entitled "General Information About The Plan."

This SPD describes the Plan's benefits and obligations as contained in the legal Plan document, which governs the operation of the Plan. The Plan document is written in much more technical and precise language. If the non-technical language under this SPD and the technical, legal language of the Plan document conflict, the Plan document always governs. If you wish to receive a copy of the legal Plan document, please contact the Administrator.

This SPD describes the current provisions of the Plan, as designed to comply with applicable legal requirements. The Plan is subject to federal laws, such as ERISA (the Employee Retirement Income Security Act), the Internal Revenue Code and other federal and state laws which may affect your rights.

The provisions of the Plan are subject to revision due to a change in laws or due to pronouncements by the Internal Revenue Service (IRS) or Department of Labor (DOL). We may also amend this Plan. If the provisions under this SPD change, we will notify you.

ARTICLE I
PARTICIPATION IN THE PLAN

Am I eligible to participate in the Plan?

Provided you are not an Excluded Employee, you are eligible to participate in the Plan once you satisfy the Plan's eligibility conditions described in the next question. The following employees are Excluded Employees and are not eligible to participate in the Plan:

- employees who are leased employees.
- employees whose employment is governed by a collective bargaining agreement under which retirement benefits were the subject of good faith bargaining, unless such agreement expressly provides for participation in this Plan.
- certain nonresident aliens who have no earned income from sources within the United States.

When am I eligible to participate in the Plan?

Provided you are not an Excluded Employee, you will be eligible to participate in the Plan once you satisfy the requirements below. However, you will actually enter the Plan once you reach the Entry Date as described in the next question.

You will be eligible to participate in the Plan if you have completed six (6) months of service.

You will have completed the required number of months if you are employed by us at any time after you have completed that number of months, measured from your initial employment commencement date.

If you are a veteran and are reemployed under the Uniformed Services Employment and Reemployment Rights Act of 1994, your qualified military service may be considered service with us. If you may be affected by this law, ask your Administrator for further details.

You should review the Article in this SPD entitled "HOURS OF SERVICE" for an explanation of an Hour of Service.

When is my Entry Date?

Provided you are not an Excluded Employee, you may begin participating under the Plan once you have satisfied the eligibility requirements and reached your "Entry Date." The Administrator may request that you complete certain paperwork related to your Plan participation. In addition, special rules may apply if you terminate employment and are then rehired. If you have questions about the timing of your Plan participation, please contact the Administrator.

Your Entry Date will be the first day of the Plan Year quarter coinciding with or next following the date you satisfy the eligibility requirements.

What happens if I'm a participant, terminate employment and then I'm rehired?

If you are no longer a participant because you terminated employment, and you are rehired, then you will continue to participate in the Plan in the same manner as if your termination had not occurred.

ARTICLE H
CONTRIBUTIONS

What kind of Plan is this?

This Plan is a type of qualified retirement plan commonly referred to as a 401(k) plan. As a participant under the Plan, you may elect to reduce your compensation by a specific percentage and have that amount contributed to the Plan on a pre-tax basis. You generally are not taxed on your salary reductions until you withdraw those amounts from the Plan. In addition, we may make additional contributions to the Plan on your behalf. This Article describes the types of contributions that may be made to the Plan and how these monies will be allocated to your account to provide for your retirement benefit.

Do I have to contribute money to the Plan in order to participate?

No, you are not required to contribute any money in order to participate in our Plan.

How much may I contribute to the Plan?

As a participant, you may elect to defer a percentage of your compensation each year instead of receiving that amount in cash. The Administrator will notify you of the maximum percentage you may defer. In addition, you may separately elect to defer up to 100% of any bonus paid to you during the year. However, your total deferrals in any taxable year may not exceed a certain dollar limit which is set by law. The limit is determined under the following schedule:

Schedule

Taxable Year	Limit
2001	$10,500
2002	$11,000
2003	$12,000
2004	$13,000
2005	$14,000
2006	$15,000

Effective as of January 1, 2002, if you are age 50 or older, then you may elect to defer additional amounts (called "catch-up contributions") to the Plan. The additional amounts may be deferred regardless of any other limitations on the amount that you may defer to the Plan. The maximum "catch-up contribution" that you can make in 2002 is $1,000. This amount is increased by $1,000 in each year after 2002 up to 2006, when the maximum is $5,000. After 2006, the maximum may increase for cost-of-living adjustments.

The amount you elect to defer, and any earnings on that amount, will not be subject to income tax until it is actually distributed to you. However, the amount you defer is counted as compensation for Social Security taxes.

You should also be aware that the annual dollar limit is an aggregate limit that applies to all deferrals you may make under this Plan or other cash or deferred arrangements (including tax-sheltered 403(b) annuity contracts, simplified employee pensions or other 401(k) plans in which you may be participating). Generally, if your total deferrals under all cash or deferred arrangements for a calendar year exceed the annual dollar limit, the excess must be included in your income for the year. For this reason, it is desirable to request in writing that these excess deferrals be returned to you. If you fail to request such a return, you may be taxed a second time when the excess deferral is ultimately distributed from the Plan.

You must decide which plan or arrangement you would like to have return the excess. If you decide that the excess should be distributed from this Plan, you must communicate this in writing to the Administrator no later than the March 1st following the close of the calendar year in which such excess deferrals were made. However, the entire dollar limit is exceeded in this Plan or any other plan maintained by us, you will be deemed to have notified the Administrator of the

excess. The Administrator will then return the excess deferral and any earnings to you by April 15th.

You will always be 100% vested (your ownership rights) in the amount you deferred. This means that you will always be entitled to all amounts that you defer. This money will, however, be affected by any investment gains or losses. If there is an investment gain, then the balance in your account will increase. If there is an investment loss, then the balance in your account will decrease.

Distributions from amounts attributable to your salary deferrals (including any offset of loans) are not permitted before age 59 1/2 EXCEPT in the event of:

(a) death;

(b) separation from service; or

(c) reasons of proven financial hardship. (See the question "Can I withdraw money from my account in the event of financial hardship?" found in the Article of this SPD entitled "In-Service Distributions" for an explanation of financial hardship.)

In the event you receive a hardship distribution from your deferrals to this Plan pursuant to your certification and agreement that certain conditions are satisfied, or any other plan maintained by us, you will not be allowed to make additional salary deferrals for a period of twelve (12) months after you receive the distribution. Furthermore, the dollar limitation set by law with respect to your taxable year following the year in which you received the distribution, will be reduced by your salary deferrals, if any, for the taxable year of the distribution.

In addition, if you are a highly compensated employee (generally owners, officers or individuals receiving wages in excess of certain amounts established by law), a distribution from amounts attributable to your salary deferrals of certain

excess contributions may be required to comply with the law. The Administrator will notify you when a distribution is required.

How often can I modify the amount I contribute?

The amount you elect to defer will be deducted from your pay in accordance with a procedure established by the Administrator. The procedure will require that you enter into a written salary reduction agreement after you satisfy the Plan's eligibility requirements. You will be permitted to modify your election during the Plan Year. However, changes to a salary reduction election are only permitted four times each year, prior to the first day of each Plan Year quarter. You are also permitted to revoke your election any time during the Plan Year.

Will the Employer contribute to the Plan?

Each year, we will contribute to the Plan the following amounts:

(a) The total amount of the salary reduction you elected to defer. (See the question in this Article entitled "How much may I contribute to the Plan?")

(b) On behalf of each participant, we will make a qualified non-elective contribution equal to a uniform percentage of your compensation, which percentage will be determined each year by the Employer.

You will share in this qualified non-elective contribution if you are actively employed during the Plan Year.

(c) A discretionary profit sharing contribution.

You must complete a Year of Service during the Plan Year and be actively employed on the last day of the Plan Year to share in this discretionary profit sharing contribution.

You will have completed a Year of Service for purposes of sharing in our contributions if you are credited with at least 1000 Hours of Service during a Plan Year.

Will I share in Employer contributions during the year of my Retirement (Normal or Late) or death?

In determining your eligibility to share in contributions for the year, there are special rules which apply if your employment terminates due to your Retirement (Normal or Late) or death.

In such cases, you will be eligible to share in the contributions in accordance with the following:

> If the reason your employment terminated is due to your Retirement (Normal or Late) or death, then you will be eligible to share in the contribution for the year without regard to whether you satisfied the requirements explained above.

How will the Employer contributions be allocated to my account?

We will allocate the amount you elect to defer to an account maintained by the Trustee on your behalf. You will always be 100% vested (your ownership rights) in these contributions.

If you are eligible, we will also allocate the qualified nonelective contribution made to the Plan on your behalf. (See the question in this Article "Will the Employer contribute to the Plan?" to determine if you are eligible.) You will always be 100% vested (your ownership rights) in these contributions.

Our discretionary profit sharing contribution will be "allocated" or divided among participants eligible to share in the contribution for the Plan Year. (See the question in this Article "Will the Employer contribute to the Plan?" to determine if you are eligible.) Your share of the contribution will

depend upon how much compensation you received during the year and the compensation received by other eligible participants.

Your share of our discretionary profit sharing contribution is determined by the following fraction:

$$\text{Employer's Discretionary Contribution} \times \frac{\text{Your Compensation}}{\text{Total Compensation of All Participants Eligible to Share}}$$

For example: Suppose our discretionary profit sharing contribution for the Plan Year is $20,000. Employee A's compensation for the Plan Year is $25,000. The total compensation of all participants eligible to share, including Employee A, is $250,000. Employee A's share will be:

$$\$20{,}000 \times \frac{\$25{,}000}{\$250{,}000} \text{ or } \$2{,}000$$

These contributions will vest (your ownership rights) in accordance with the vesting schedule. (See the question "What is my vested interest in my account?" found in the Article of this SPD entitled "Retirement Benefits" for an explanation of your ownership rights.)

In addition to our contributions made to your account, your account will be credited annually with a share of the investment earnings or losses of the trust fund.

What compensation is used to determine my Plan benefits?

For the purposes of the Plan, compensation has a special meaning. Compensation is defined as your total compensation that is subject to income tax, that is, all of your compensation paid to you by us during a Plan Year, but

- including your salary reduction contributions to any plan or arrangement maintained by your Employer.

Your compensation will be recognized for benefit purposes from your date of entry into the Plan.

Is there a limit on the amount of compensation which can be considered?

The Plan, by law, cannot recognize compensation in excess of $200,000 ($170,000 for years beginning prior to 2002). This amount will be adjusted in future years for cost of living increases.

Are there limits on how much can be contributed to my account each year?

Generally, the law imposes a maximum limit on the amount of contributions you may receive under the Plan. This limit applies to all contributions we make on your behalf, all contributions you make to the Plan and any other amounts allocated to any of your accounts during the Plan Year, excluding earnings and any transfers/rollovers. This total cannot exceed the lesser of $40,000 ($35,000 for the year beginning in 2001) or 100% (25% for years beginning prior to 2002) of your annual compensation (for this purpose, compensation includes your salary deferrals).

May I "rollover" payments from other retirement plans or IRAs?

At the discretion of the Administrator, if you are a participant, you may be permitted to deposit into the Plan distributions you have received from other plans and IRAs. Such a deposit is called a "rollover" and may result in tax savings to you. You may ask your prior plan administrator or trustee to directly transfer (a "direct rollover") to this Plan all or a portion of any amount which you are entitled to receive as a distribution from a prior plan. Alternatively, if you received a distribution from a prior plan, you may elect to deposit any amount eligible for rollover within 60 days of your receipt of the distribution. You should consult qualified counsel to determine if a rollover is permitted and in your best interest.

Your rollover will be placed in a separate account called a "participant's transfer/rollover account." You will always be 100% vested (your ownership rights) in "rollovers" and "direct rollovers." This means that you will always be entitled to all of your rollover contributions. Rollover contributions will be affected by any investment gains or losses.

You may withdraw the amounts in your. "participant's transfer/rollover account" at any time.

How is the money in the Plan invested?

You will be able to direct the investment of your entire interest in the Plan. The Administrator will provide you with information on the investment choices available to you, the frequency with which you can change your investment choices and other information. Periodically, you will receive a benefit statement that provides information on your account balance and your investment returns. If you have any questions about the investment of your Plan accounts, please contact the Administrator (or other Plan representative). To the extent you do not direct the investment of your Plan benefits, the Trustee or another designated person will be responsible for the investment of all assets held by the Plan. The Trustee or another designated person will make investment decisions that are made in the best interests of you and other Plan participants.

ARTICLE III
RETIREMENT BENEFITS

What benefits will I receive at normal retirement?

You will be entitled to all your accounts under the Plan when you reach your Normal Retirement Age. However, actual payment of your benefits will, at your election, occur as soon as administratively feasible following your Normal Retirement Date.

Your Normal Retirement Date is the first day of the month coinciding with or next following your Normal Retirement Age.

You will attain your Normal Retirement Age when you reach your 65 birthday.

What is my Late Retirement Date?

You may remain employed past the Plan's Normal Retirement Date and retire instead on your Late Retirement Date. Your Late Retirement Date is the first day of the month coinciding with or next following the date you choose to retire after first having reached your Normal Retirement Date. On your Late Retirement Date, you will be entitled to all your accounts under the Plan. However, actual payment of your benefits will, at your election, occur as soon as administratively feasible following your Late Retirement Date.

What happens if I leave the Employer's workforce before I retire?

The Plan is designed to encourage you to stay with us until retirement. Payment of your account balance under the Plan is available upon your death or retirement.

If your employment terminates for reasons other than those listed above, you will be entitled to receive only your vested percentage (your ownership rights) of your account balance.

You may elect to have your vested benefit distributed to you as soon as administratively feasible following your termination of employment. However, if the value of your vested benefit is less than a certain dollar threshold, a distribution will be made to you within a reasonable time after you terminate employment. (See the question "How will my benefits be paid?" found in the Article of this SPD entitled "FORM OF BENEFIT PAYMENT" for an explanation of the dollar threshold.)

What is my vested interest in my account?

Your vested percentage in your account is determined under the following schedule and is based on vesting Years of Service. You will always, however, be 100% vested upon your Normal Retirement Age.

Vesting Schedule

Years of Service	Percentage
Less than 2	0 %
2	20 %
3	40 %
4	60 %
5	80 %
6	100 %

Regardless of the vesting schedule above, you are always 100% vested in your salary reduction amounts and our qualified non-elective contributions contributed to the Plan.

Your vested percentage will not be less than your vested percentage under the Plan before this amendment and restatement.

Your vested benefit will normally be distributed to you or your beneficiary upon your death or retirement.

How do I determine my Years of Service for vesting purposes?

To earn a Year of Service, you must be credited with at least 1000 Hours of Service during any Plan Year. (See the Article in this SPD entitled "HOURS OF SERVICE" for an explanation of Hour of Service). The Plan contains specific rules for crediting Hours of Service for vesting purposes. The Administrator will track your service and will credit you with a Year of Service for each Plan Year in which you are credited with the required Hours of Service, in accordance with the terms of the Plan. If you have any questions regard-

ing your vesting service, you should contact the Administrator.

Does all my service count for vesting purposes?

In calculating your vested percentage, all service you perform for us will generally be counted. However, there are some exceptions to this general rule.

Break in Service rules. If you terminate employment and are rehired, you may "lose" credit for prior service under the Plan's Break in Service rules.

For vesting purposes, you will have a Break in Service if you complete less than 501 Hours of Service during the computation period used to determine whether you have a Year of Service. However, if you are absent from work for certain leaves of absence such as maternity or paternity leave, you may be credited with 501 Hours of Service to prevent a Break in Service.

Five-year Break in Service rule. The five-year Break in Service rule applies only to totally nonvested (0% vested) participant's. If you are totally nonvested in your benefits resulting from our contributions and you have five consecutive Breaks in Service (as defined above), all the service you earned before the 5-year period no longer counts for vesting purposes. Thus, if you return to employment after incurring five consecutive Breaks in Service, you will be treated as a new employee (with no prior service) for purposes of determining your vested percentage under the Plan. However, if you have benefits under the Plan resulting from our contributions which are vested, you do not lose any rights to those benefits under these rules.

As a veteran, will my military service count as service with the Employer?

If you are a veteran and are reemployed under the Uniformed Services Employment and Reemployment Rights Act

of 1994, your qualified military service may be considered service with us. If you may be affected by this law, ask your Administrator for further details.

What happens to my non-vested account balance if I'm rehired?

If you had no vested percentage in your account balance when you left, your account balance was forfeited. However, if you return to service with us before incurring 5 consecutive 1-Year Breaks in Service, your account balance as of your termination date will be restored unadjusted for any gains or losses.

If you were partially vested in your account balance when you left, the non-vested portion of your account balance will be forfeited on the earlier of the date:

(a) of the distribution of your entire vested account balance, or

(b) when you incur 5 consecutive 1-Year Breaks in Service.

If you previously received a distribution of your entire vested account balance, and are reemployed prior to incurring 5 consecutive 1-Year Breaks in Service, you may repay this distribution. If you repay the entire amount of the distribution, we will restore your account balance with your forfeited amount. You must repay this distribution within five years from your date of reemployment, or, if earlier, before you incur 5 consecutive I-Year Breaks in Service. If you were fully vested when you left, you do not have the opportunity to repay your distribution.

What happens to the non-vested portion of a terminated participant's account balance?

The non-vested portion of a terminated participant's account balance remains in the Plan and is called a forfeiture. Forfeitures may be used by the Plan for several purposes such

as the payment of Plan expenses. Any forfeitures not used by the Plan will be added to our discretionary profit sharing contribution and allocated to participants eligible to share in such contribution in the same manner as any such discretionary profit sharing contribution is allocated.

ARTICLE IV
DISABILITY BENEFITS

Are disability benefits provided?

No disability benefits are provided in the Plan. You will receive your normal benefits on termination of employment.

ARTICLE V
FORM OF BENEFIT PAYMENT

How will my benefits be paid?

All distributions from the Plan will be made in one lump-sum payment in cash. If your vested benefit under the Plan exceeds $5,000, then you must consent to the distribution before it may be made. If your vested benefit under the Plan does not exceed $5,000, then your benefit must be distributed to you as soon as possible following the event that entitles you to a distribution.

With respect to distributions made on and after January 1, 2002 with respect to participants who separate from service on or after, when determining your vested benefit under the Plan, "rollovers" (and any earnings allocable to "rollover" contributions) will not be taken into account. (See the question "May I "rollover" payments from other retirement plans or IRAs?" found in the Article in this SPD entitled "CONTRIBUTIONS" for an explanation of a "rollover.")

May I delay the receipt of benefits?

Yes, you may delay the receipt of benefits unless a distribution is required to be made, as explained earlier, because your vested benefit under the Plan does not exceed $5,000.

However, in addition to the benefit payment mentioned above, there are rules which require that certain minimum distributions be made from the Plan. Generally, these minimum distributions must begin not later than the April 1st following the year in which you reach age 70 1/2. However, if you are not a 5% owner and reach the age of 70 1/2 after the later of 1998 or the date your Employer adopts an amendment to the Plan to eliminate the age 70 1/2 required distribution, these required distributions must begin not later than the later of the April 1st following the end of the year in which you reach age 70 1/2 or retire. You should see the Administrator if you feel you may be affected by these rules.

ARTICLE VI
DEATH BENEFITS

What happens if I die while working for the Employer?

If you die while working for us, your entire account balance will be used to provide your beneficiary with a death benefit.

Who is the beneficiary of my death benefit?

If you are married at the time of your death, your spouse will be the beneficiary of the death benefit, unless an election is made to change the beneficiary. IF YOU WISH TO DESIGNATE A BENEFICIARY OTHER THAN YOUR SPOUSE, HOWEVER, YOUR SPOUSE MUST IRREVOCABLY CONSENT TO WAIVE ANY RIGHT TO THE DEATH BENEFIT. YOUR SPOUSE'S CONSENT MUST BE IN WRITING, BE WITNESSED BY A NOTARY OR A PLAN REPRESENTATIVE AND ACKNOWLEDGE THE SPECIFIC NONSPOUSE BENEFICIARY.

If you are married and you change your designation, your spouse must again consent to the change. In addition, you may elect a beneficiary other than your spouse without your spouse's consent if your spouse cannot be located.

If you are not married at the time of your death, you may designate the beneficiary on a form to be supplied to you by the Administrator.

In the event no valid designation of beneficiary exists, or if the beneficiary is not alive at the time of your death, the death benefit will be paid to your estate.

How will the death benefit be paid to my beneficiary?

The death benefit will be paid to your beneficiary in a single lump-sum payment in cash.

When must the last payment be made to my beneficiary?

If your designated beneficiary is a person (rather than your estate or most trusts) then minimum distributions of your death benefit must generally begin within one year of your death and must be paid over a period not extending beyond your beneficiary's life expectancy. If your spouse is the beneficiary, the start of payments may be delayed until the year in which you would have attained age 70 1/2. Generally, if your beneficiary is not a person, then your entire death benefit must be paid within five years after your death.

Since your spouse has certain rights to the death benefit, you should immediately report any change in your marital status to the Administrator.

What happens if I'm a participant, terminate employment and die before receiving all my benefits?

If you terminate employment with us and subsequently die, your beneficiary will be entitled to the vested percentage of your remaining account balance at the time of your death.

ARTICLE VII
IN-SERVICE DISTRIBUTIONS

Can I withdraw money from my account while working?

Generally, you may receive a distribution from the Plan prior to your termination of employment if you satisfy certain conditions.

Can I withdraw money from my account in the event of financial hardship?

Yes, if you satisfy certain conditions, the Administrator may direct the Trustee to distribute up to 100% of your account balance attributable to your salary reduction election in the event of hardship. This hardship distribution is not in addition to your other benefits and will therefore reduce the value of the benefits you will receive at normal retirement.

What constitutes a hardship?

A hardship is allowed only on account of an immediate and heavy financial need, which is payment in the event of one of the following:

(a) The payment of expenses for medical care (described in Section 213(d) of the Internal Revenue Code) previously incurred by you or your dependent or necessary for you or your dependent to obtain medical care;

(b) The costs directly related to the purchase of your principal residence (excluding mortgage payments);

(c) The payment of tuition, related educational fees, and room and board expenses for the next twelve (12) months of post-secondary education for yourself, your spouse or dependent; or

(d) The payment necessary to prevent your eviction from your principal residence or foreclosure on the mortgage of your principal residence.

Are there any conditions to receiving a hardship distribution?

A distribution will be made from your account, but only if you certify and agree that all of the following conditions are satisfied:

(a) The distribution is not in excess of the amount of your immediate and heavy financial need. The amount of your immediate and heavy financial need may include

any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution;

(b) You have obtained all distributions, other than hardship distributions, and all nontaxable (at the time of the loan) loans currently available under all plans maintained by us;

(c) That your elective contributions and employee contributions, with respect to a hardship distribution after December 31, 2001, will be suspended for at least six (6) months after your receipt of the hardship distribution. If you receive a hardship distribution during 2001, you are prohibited from making elective contributions and employee contributions for at least twelve (12) months after your receipt of the hardship distribution; and

(d) That you will not make elective contributions for your taxable year immediately following the taxable year of the hardship distribution, except to the extent permitted by the Plan.

In addition to these rules, there are restriction placed on hardship distributions which are made from certain accounts. These accounts are generally the accounts which receive your salary reduction contributions and other Employer contributions which are used to satisfy special rules that apply to 401(k) plans. Any hardship distribution from these accounts will be limited, as of the date of distribution, to your total salary reduction contributions, reduced by the amount of any previous distributions made to you from these accounts. Ask your Administrator if you need further details.

ARTICLE VIII
TAX TREATMENT OF DISTRIBUTIONS

What are my tax consequences when I receive a distribution from the Plan?

Generally, you must include any Plan distribution in your taxable income in the year in which you receive the distribution. The tax treatment may also depend on your age when you receive the distribution.

Can I reduce or defer tax on my distribution?

You may reduce, or defer entirely, the tax due on your distribution through use of one of the following methods:

(a) The rollover of all or a portion of the distribution to a traditional Individual Retirement Account (IRA) or another qualified employer plan. This will result in no tax being due until you begin withdrawing funds from the traditional IRA or other qualified employer plan. The rollover of the distribution, however, MUST be made within strict time frames (normally, within 60 days after you receive your distribution). Under certain circumstances all or a portion of a distribution (such as a hardship distribution from your salary reduction contributions and, after 2001, any hardship distribution) may not qualify for this rollover treatment. In addition, most distributions will be subject to mandatory federal income tax withholding at a rate of 20%. This will reduce the amount you actually receive. For this reason, if you wish to rollover all or a portion of your distribution amount, the direct transfer option described in paragraph (b) below would be the better choice.

(b) For most distributions, you may request that a direct transfer of all or a portion of a distribution be made to either a traditional Individual Retirement Account (IRA) or another qualified employer plan willing to accept the

transfer. A direct transfer will result in no tax being due until you withdraw funds from the traditional IRA or other qualified employer plan. Like the rollover, under certain circumstances all or a portion of the amount to be distributed may not qualify for this direct transfer, e.g., a distribution of less than $200 will not be eligible for a direct transfer. If you elect to actually receive the distribution rather than request a direct transfer, then in most cases 20% of the distribution amount will be withheld for federal income tax purposes.

WHENEVER YOU RECEIVE A DISTRIBUTION, THE ADMINISTRATOR WILL DELIVER TO YOU A MORE DETAILED EXPLANATION OF THESE OPTIONS. HOWEVER, THE RULES WHICH DETERMINE WHETHER YOU QUALIFY FOR FAVORABLE TAX TREATMENT ARE VERY COMPLEX. YOU SHOULD CONSULT WITH QUALIFIED TAX COUNSEL BEFORE MAKING A CHOICE.

ARTICLE IX
HOURS OF SERVICE

What is an Hour of Service?

You will be credited with an Hour of Service for:

(a) each hour for which you are directly or indirectly compensated by us for the performance of duties during the Plan Year;

(b) each hour for which you are directly or indirectly compensated by us for reasons other than performance of duties (such as vacation, holidays, sickness, disability, lay-off, military duty, jury duty or leave of absence during the Plan Year); and

(c) each hour for back pay awarded or agreed to by us.

You will not be credited for the same Hours of Service both under (a) or (b), as the case may be, and under (c).

How are Hours of Service credited?

You will be credited with your actual Hours of Service.

ARTICLE X
LOANS

May I borrow money from the Plan?

Yes. You may request a participant loan using an application form provided by the Administrator. Your ability to obtain a participant loan depends on several factors. The Administrator will determine whether you satisfy these factors.

What are the loan rules and requirements?

There are various rules and requirements that apply for any loan which are outlined in this question. In addition, we have established a written loan program which explains these requirements in more detail. You can request a copy of the loan program from the Administrator. Generally, the rules for loans include the following:

- Loans are available to participants on a reasonably equivalent basis. Loans will be made to participants who are creditworthy. The Administrator may request that you provide additional information, such as financial statements, tax returns and credit reports to make this determination.

- All loans must be adequately secured. You must sign a promissory note along with a loan pledge. Generally, you must use your vested account balance as security for the loan, provided the outstanding balance of all your loans does not exceed 50% of your vested account balance. In certain cases, the Administrator may require you to provide additional collateral to receive a loan.

- You will be charged a reasonable rate of interest for any loan received from the Plan. The Administrator will determine a reasonable interest rate by reviewing the

interest rates charged for similar types of loans by other lenders.

• If approved, your loan will provide for level amortization with payments to be made not less frequently than quarterly. Generally, the term of the loan may not exceed five (5) years. However, if the loan is for the purchase of your principal residence, the Administrator may permit a longer repayment period. Unless approved by the Administrator, you must repay your loan through payroll deduction. If you have an unpaid leave of absence or go on military leave while you have an outstanding loan, please contact the Administrator to find out your repayment options.

• All loans will be considered a directed investment from your account under the Plan. All payments of principal and interest by you on a loan will be credited to your account.

• The amount the Plan may loan to you is limited by rules under the Internal Revenue Code. All loans, when added to the outstanding balance of all other loans from the Plan, will be limited to the lesser of:

(a) $50,000 reduced by the excess, if any, of your highest outstanding balance of loans from the Plan during the one-year period prior to the date of the loan over your current outstanding balance of loans; or

(b) 1/2 of your vested account balance.

Also, no loan in an amount less than $1,000 will be made nor will a loan be made if a prior loan is currently outstanding.

• If you fail to make payments when they are due under the terms of the loan, you will be considered to be "in default." The Trustee will consider your loan to be in default if any scheduled loan repayment is not made by

the end of the calendar quarter following the calendar quarter in which the missed payment was due. The Plan would then have authority to take all reasonable actions to collect the balance owing on the loan. This could include filing a lawsuit or foreclosing on the security for the loan. Under certain circumstances, a loan that is in default may be considered a distribution from the Plan, and could result in taxable income to you. In any event, your failure to repay a loan will reduce the benefit you would otherwise be entitled to from the Plan.

ARTICLE XI
YOUR PLAN'S TOP HEAVY RULES

What is a top heavy plan?

A retirement plan that primarily benefits "key employees" is called a "top heavy plan." Key employees are certain owners or officers of the Employer. A plan is generally a "top heavy plan" when more than 60% of the Plan assets are attributable to key employees.

Each year, the Administrator is responsible for determining whether the Plan is a "top heavy plan."

What happens if the Plan becomes top heavy?

If the Plan becomes top heavy in any Plan Year, then non-key and key employees will be entitled to certain "top heavy minimum benefits," and other special rules will apply. Among these top heavy rules are the following:

- We may be required to make a contribution to your account in order to provide you with at least "top heavy minimum benefits."

If you are a participant in more than one Plan, you may not be entitled to "top heavy minimum benefits" under both Plans.

ARTICLE XII
PROTECTED BENEFITS

Is my benefit protected?

As a general rule, your interest in your account, including your vested interest, may not be alienated. This means that your interest may not be sold, used as collateral for a loan (other than a Plan loan), given away or otherwise transferred. In addition, your creditors may not attach, garnish or otherwise interfere with your account.

Are there any exceptions to the general rule?

There are two exceptions to this general rule. The Administrator must honor a "qualified domestic relations order." A "qualified domestic relations order" is defined as a decree or order issued by a court that obligates you to pay child support or alimony, or otherwise allocates a portion of your assets in the Plan to your spouse, former spouse, child or other dependent. If a qualified domestic relations order is received by the Administrator, all or a portion of your benefits may be used to satisfy the obligation. The Administrator will determine the validity of any domestic relations order received. You and your beneficiaries can obtain, without charge, a copy of the QUALIFIED DOMESTIC RELATIONS ORDER PROCEDURE from the Administrator.

The second exception applies if you are involved with the Plan's administration. If you are found liable for any action that adversely affects the Plan, the Administrator can offset your benefits by the amount you are ordered or required by a court to pay the Plan. All or a portion of your benefits may be used to satisfy any such obligation to the Plan.

Can the Plan be amended?

Yes. We have the right to amend the Plan at any time. In no event, however, will any amendment authorize or permit any part of the Plan assets to be used for purposes other than

the exclusive benefit of participants or their beneficiaries. Additionally, no amendment will cause any reduction in the amount credited to your account.

What happens if the Plan is discontinued or terminated?

Although we intend to maintain the Plan indefinitely, we reserve the right to terminate the Plan at any time. Upon termination, no further contributions will be made to the Plan and all amounts credited to your accounts will become 100% vested. We will direct the distribution of your accounts in a manner permitted by the Plan as soon as practicable. (See the question "How will my benefits be paid?" found in the Article of this SPD entitled "FORM OF BENEFIT PAYMENT.") You will be notified of any modification or termination of the Plan.

What are my rights as a Plan participant?

As a participant in the Plan you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA provides that all Plan participants are entitled to:

(a) Examine, without charge, at the Administrator's office and at other specified locations, all documents governing the Plan, including insurance contracts and collective bargaining agreements, and a copy of the latest annual report (Form 5500 Series) filed by the Plan with the U.S. Department of Labor and available at the Public Disclosure Room of the Pension and Welfare Benefit Administration.

(b) Obtain, upon written request to the Administrator, copies of documents governing the operation of the Plan, including insurance contracts and collective bargaining agreements, and copies of the latest annual report (Form 5500 Series) and updated summary plan description. The Administrator may make a reasonable charge for the copies.

(c) Receive a summary of the Plan's annual financial report. The Administrator is required by law to furnish each participant with a copy of this summary annual report.

(d) Obtain a statement telling you whether you have a right to receive a pension at Normal Retirement Age and, if so, what your benefits would be at Normal Retirement Age if you stop working under the Plan now. If you do not have a right to a pension benefit, the statement will tell you how many years you have to work to get a right to a pension. THIS STATEMENT MUST BE REQUESTED IN WRITING AND IS NOT REQUIRED TO BE GIVEN MORE THAN ONCE EVERY TWELVE (12) MONTHS. The Plan must provide this statement free of charge.

What duties are imposed on the people or entities who operate the Plan?

In addition to creating rights for Plan participants, ERISA imposes duties upon the people who are responsible for the operation of the Plan. These people called "fiduciaries" of the Plan, have a duty to operate the Plan prudently and in the interest of you and other Plan participants and beneficiaries. No one, including your Employer or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a pension benefit or exercising your rights under ERISA.

If your claim for a pension benefit is denied or ignored, in whole or in part, you have a right to know why this was done, to obtain copies of documents relating to the decision without charge, and to appeal any denial, all within certain time schedules.

Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the Plan and do not receive them within 30 days, you may file

suit in a Federal court. In such a case, the court may require the Administrator to provide the materials and pay you up to $1 10.00 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the Administrator.

If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or Federal court. In addition, if you disagree with the Plan's decision or lack thereof concerning the qualified status of a domestic relations order or a medical child support order, you may file suit in Federal court.

If it should happen that the Plan's fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a Federal court. The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees if, for example, it finds your claim is frivolous.

How do I submit a claim for Plan benefits?

You may submit to the Administrator a written claim for benefits under the Plan. The Administrator will evaluate your claim to determine if benefits are payable to you under the terms of the Plan. The Administrator may solicit additional information from you if necessary to evaluate the claim.

If the Administrator determines the claim is valid, then you will receive a statement describing the amount of benefit, the method or methods of payment, the timing of distributions and other information relevant to the payment of the benefit.

What if my benefits are denied?

Benefits will be paid to you and your beneficiaries without the necessity of formal claims. You or your beneficiaries may

make a request for any Plan benefits to which you believe you are entitled. Any such request should be in writing and should be made to the Administrator.

Your request for Plan benefits will be considered a claim for Plan benefits, and it will be subject to a full and fair review. If your claim is wholly or partially denied, the Administrator will furnish you with a written notice of this denial. This written notice must be provided to you within a reasonable period of time (generally 90 days) after the receipt of your claim by the Administrator. The written notice must contain the following information:

(a) the specific reason or reasons for the denial;

(b) specific reference to those Plan provisions on which the denial is based;

(c) a description of any additional information or material necessary to correct your claim and an explanation of why such material or information is necessary; and

(d) appropriate information as to the steps to be taken if you or your beneficiary want to submit your claim for review.

If notice of the denial of a claim is not furnished to you in accordance with the above within a reasonable period of time, your claim will be deemed denied. You will then be permitted to proceed to the review stage.

If your claim has been denied or deemed denied, and you want to submit your claim for review, you must follow the Claims Review Procedure.

What is the Claims Review Procedure?

Upon the denial of your claim for benefits, you may file your claim for review, in writing, with the Administrator.

(a) YOU MUST FILE THE CLAIM FOR REVIEW NO LATER THAN 60 DAYS AFTER YOU HAVE RECEIVED WRITTEN NOTIFICATION OF THE DENIAL OF YOUR CLAIM FOR BENEFITS, OR IF NO WRITTEN DENIAL OF YOUR CLAIM WAS PROVIDED, NO LATER THAN 60 DAYS AFTER THE DEEMED DENIAL OF YOUR CLAIM.

(b) You may review all pertinent documents relating to the denial of your claim and submit any issues and comments, in writing, to the Administrator.

(c) Your claim for review must be given a full and fair review. If your claim is denied, the Administrator must provide you with written notice of this denial within 60 days after the Administrator's receipt of your written claim for review. There may be times when this 60 day period may be extended. This extension may only be made, however, when there are special circumstances which are communicated to you in writing within the 60 day period. If there is an extension, a decision will be made as soon as possible, but not later than 120 days after receipt by the Administrator of your claim for review.

(d) The Administrator's decision on your claim for review will be communicated to you in writing and will include specific references to the pertinent Plan provisions on which the decision was based.

(e) If the Administrator's decision on review is not furnished to you within the time limitations described above, your claim will be deemed denied on review.

(f) If benefits are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws, the claims procedure relating to those benefits may provide for review. If so, that company,

service, or organization will be the entity to which claims are addressed. Ask the Administrator if you have any questions regarding the proper person or entity to address claims.

If you have a claim for benefits which is denied upon review or ignored, in whole or in part, you may file suit in a state or Federal court.

What can I do if I have questions or my rights are violated?

If you have any questions about the Plan, you should contact the Administrator. If you have any questions about this statement or about your rights under ERISA, or if you need assistance in obtaining documents from the Administrator, you should contact the nearest office of the Pension and Welfare Benefits Administration, U.S. Department of Labor, listed in the telephone directory or the Division of Technical Assistance and Inquiries, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Pension and Welfare Benefits Administration.

ARTICLE XIII
GENERAL INFORMATION ABOUT THE PLAN

There is certain general information which you may need to know about the Plan. This information has been summarized for you in this Article.

General Plan Information

DeWolff, Boberg & Associates Employees' Savings Plan is the name of the Plan.

We have assigned Plan Number 003 to the Plan.

The amended and restated provisions of the Plan become effective on January 1, 2001.

The Plan's records are maintained on a twelve-month period of time. This is known as the Plan Year. The Plan Year begins on January 1 and ends on December 31.

Certain valuations and distributions are made on the Anniversary Date of the Plan. This date is the last day of the Plan Year.

The contributions made to the Plan will be held and invested by the Trustee of the Plan.

The Plan and Trust will be governed by the laws of the State of South Carolina.

Benefits provided by the Plan are NOT insured by the Pension Benefit Guaranty Corporation (PBGC) because the insurance provisions under the Employee Retirement Income Security Act (ERISA) are not applicable to the Plan.

Employer Information

Your Employer's name, address and identification number are:

DeWolff, Boberg & Associates, Inc.
102 Professional Building
Hilton Head Island, South Carolina 29928
57-0868048

Administrator Information

The Administrator is responsible for the day-to-day administration and operation of the Plan. For example, the Administrator maintains the Plan records, including your account information, provides you with the forms you need to complete for Plan participation and directs the payment of your account at the appropriate time. The Administrator will also allow you to review the formal Plan document and certain other materials related to the Plan. If you have any questions about the Plan and your participation, you should contact the Administrator. The Administrator, may designate

another person or persons to perform some duties of the Administrator.

The name, address and business telephone number of the Administrator are:

DeWolff, Boberg & Associates, Inc.
102 Professional Building
Hilton Head Island, South Carolina 29928
843-785-4018

Trustee Information

All money that is contributed to the Plan is held in a trust fund. The Trustee is responsible for the safekeeping of the trust fund. The trust fund established by the Trustee will be the funding medium used for the accumulation of assets from which benefits will be distributed.

The names of the Plan's Trustees are:

Timothy S. Boberg, Trustee
Becky Albright, Trustee

The Trustees shall collectively be referred to as Trustee throughout this Summary Plan Description.

The principal place of business of the Plan's Trustee is:

102 Professional Building
Hilton Head Island, South Carolina 29928

Service of Legal Process

The name and address of the Plan's agent for service of legal process are:

DeWolff, Boberg & Associates, Inc.
102 Professional Building
Hilton Head Island, South Carolina 29928

Service of legal process may also be made upon the Trustee or Administrator.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

[Filed FEB 9, 2005]

Case No.: 2:04-1747-18

JAMES LARUE,

Plaintiff,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., and DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN,

Defendants.

REPLY TO THE DEFENDANTS' MOTION TO DISMISS

Plaintiff, replying to the Defendants' Fed.R.Civ.P. 12(c) motion to dismiss, would respectfully show unto this court as follows.

ISSUE

Has the Plaintiff stated a valid claim for relief, on the face of his complaint, so as to warrant the court's denial of the Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(c).

OVERVIEW AND FACTS

Plaintiff agrees with the Defendants' statement of the standard of review to be employed by the court in evaluating the Defendants' Fed.R.Civ.P. 12(c) motion. Accordingly, Plaintiff will not burden the court with a further recitation of law relating to that standard. Additionally, Plaintiff has reviewed the statement of facts which were taken directly from the Plaintiff s complaint and Plaintiff concurs with that

statement of fact so Plaintiff will not burden the court with further recitation of fact.

Essentially, Plaintiff simply alleges that the Defendants breached its' fiduciary duties under E.R.I.S.A. in not following Plaintiff's investment advice relating to the Defendant E.R.I.S.A. governed plan. The Defendants' brief does not address the soundness of the Plaintiff's legal theory of liability, but, instead, focuses very narrowly on the remedy requested by the Plaintiff and Defendants argue that the remedy Plaintiff requests is not available under E.R.I.S.A. Although, Plaintiff will not address the facts in any detail, Plaintiff would like to point out one important fact that Defendants failed to mention. Plaintiff is still a participant in the subject plan. Plaintiff has not been "paid out" nor has he ceased to participate in the plan. For reasons that will be set forth below in the argument, Plaintiff believes the foregoing fact to be important.'[1]

In the very first sentence of its' brief, the Defendants assert that the Plaintiff seeks "money damages". (See Defendants' brief, pg. 1) However, the Defendants' characterization of the relief sought by Plaintiff is not accurate. No where in his complaint does the Plaintiff ask for "money damages". Plaintiff does not seek any sort of money judgment against either Defendant. Plaintiff respectfully submits that the very relief he seeks is a well recognized form of relief under E.R.I.S.A. Specifically, Plaintiff's request for relief states:

> "Plaintiff respectfully requests that the court also award Plaintiff "make whole" or other equitable relief as allowed by E.R.I.S.A. 29 U.S.C.S. § 1132(a)(3) and that

---

[1] See Plaintiff's complaint, VII., alleging that he is "a participant in the plan and has continuously been since prior to calendar year 2001." and Defendants' answer, 7, admitting the same. See also Defendants' brief alleging that Plaintiff has been participating in the plan continuously since 1993.

the court award the Plaintiff attorney's fees and costs pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(g)."

LAW AND ARGUMENT

The Defendants assert repeatedly in their brief that Plaintiff is really seeking money damages, but such is not the case. The Defendants cite the Supreme Court cases of *Mertens*[2] and *Great West*[3] for the proposition that under E.R.I.S.A. a person cannot recover money damages at law. Plaintiff's counsel is well aware of *Mertens* and *Great West* and fully concurs that a claimant cannot recover money damages at law under E.R.I.S.A. However, despite the Defendants' argument to the contrary, neither *Mertens* nor *Great West* hold outright that an individual can never recover money under E.R.I.S.A. Instead, both cases recognized that the circumstances under which a person may recover money under E.R.I.S.A. as equitable relief are narrow. Accordingly, Plaintiff respectfully submits that there is no "absolute rule" that a Plaintiff can recover money under E.R.I.S.A.

However, the Plaintiff does not necessarily seek monetary relief and Plaintiff's counsel can envision several forms of relief which the court could employ where the Plaintiff would not receive a money payment directly. Regardless of whether the court holds Plaintiff is entitled to money or some other form of equitable relief, Plaintiff respectfully submits that it is clear that the sort of "make whole" relief that the Plaintiff seeks is allowable under E.R I. S.A.

Plaintiff and Defendants both primarily rely upon the same case for their respective positions. One of the key cases in Plaintiff's opinion which clearly demonstrates that the relief which Plaintiff seeks is available is *Rego v. Westvaco Cor-*

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[2] *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

[3] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

poration, et. al.[4] *Rego* is a published opinion and the Defendant relies upon that opinion in its' brief. However, Plaintiff does not believe that the opinion holds as Defendants propose. In *Rego*, the plaintiff alleged a breach of fiduciary duty under E.R.I.S.A., but then sought $85,000.00 in damages from the defendant Westvaco for the breach. The court found that what *Rego* was seeking (i.e., $85,000.00) was not what *Rego* actually lost. In other words, *Rego* sought much more than to be made whole. The importance of the *Rego* decision is that, although the court held that *Rego* was not really seeking "make whole" relief because he was seeking much more than it would take to "make him whole", the court did not hold in *Rego* that "make whole" relief was not available. Instead, the court held that factually *Rego* was clearly not seeking "make whole" relief. Specifically, the court stated:

> "Rego next argues that the relief he seeks is equitable because make-whole relief has traditionally been available under trust law as an equitable form of relief for a trustee's breach of duty. But it is obvious on the face of his complaint that Rego is not actually trying to make himself whole. At most, defendants' actions caused Rego to lose approximately $24,500: the difference between the valuation on October 21, 1997 and the amount for which he eventually sold his shares. Rego, however, requests far more than that amount: approximately $80,000, a figure based on the difference between the October 21 valuation and the March 2, 1999 valuation. This claim in no way correspondences to any out of pocket loss; it is thus in no sense a request to be "restored to the position [he] would have occupied if the misrepresentations . . . had never occurred." *Rego v. Westvaco Corporation, et. al.*, 319 F.3d 140, 146, citing *Howe v. Variety Corp.*, 36 F.3d 746, 756 (8th Cir. 1994), aff'd, 516 U.S. 489 (1996).

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[4] 319 F.3d 140 (4th Cir. 2003)

Although the Defendants reference in their brief a figure of $150,000.00 which is contained in Plaintiff's complaint, that figure was intended merely to orientate the court as to what Plaintiff believed the breach of fiduciary duty cost him at the time he filed his complaint.[5] Plaintiff only wants to be "made whole". Plaintiff has not asked the court to give him "$150,000.00" by way of a money judgment. Whatever the figure, Plaintiff only wants what will make him whole and no more.[6]

In fact, in an unpublished case that is factually different, but legally, exactly on point, the Fourth Circuit held that where a fiduciary breaches its' duties under E.R.I.S.A. that it is appropriate for the breaching fiduciary to make the person whole and in that case, the court ordered the breaching fiduciary to pay a specific amount of money to make the plaintiff whole. In *Shade v. Panhandle*,[7] a plan administrator had breached its' fiduciary duty by failing to properly advise a health insurance plan participant of a change in status under the plan. Because the plan participant was not properly advised, he incurred significant medical bills for which there was no coverage. The court, affirming the district court, held:

> "A fiduciary that breaches the fiduciary duties owed a plan participant is personally liable "to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C.S. § 1109(a) (1988). The district court found

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[5] In reality, the loss to his plan interest that Plaintiff suffered has now been calculated at a little less than $100,000.00 as is reflected in recent documents sent to the Defendants.

[6] If Plaintiff is to prevail, he has also respectfully asked that the court award him attorney's fees and costs, but, obviously, that award would be to his attorney and not to the Plaintiff directly.

[7] 1996 U.S. App. LEXIS 16703 (4th Cir. 1996), unpublished, a copy of which is attached to this memorandum as exhibit A.

> that, in this case, the appropriate remedy was to restore Stephens to the position he would have occupied but for Panhandle's breach of its fiduciary duty. See *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). Accordingly, the court ordered Panhandle to reimburse Stephens for all medical expenses incurred between March 1991 (the date on which his Blue Cross coverage terminated) and April 1993 (the date Stephens became eligible for Medicare benefits). Stephens' documentation revealed that he incurred $124,542.89 in medical expenses between March 1991 and April 1993. The district court subtracted from that total $1,734.72 in insurance premiums that Stephens would have had to pay Panhandle's group health plan during that time. Accordingly, the district court properly ordered Panhandle to reimburse Stephens for medical expenses in the amount of $122,808.17." (See exhibit A hereto, pg. 6 of 8)[8]

In the published Rego case cited above, the Fourth Circuit cites with approval the Eighth Circuit opinion of *Howe v. Varity Corporation*.[9] In the *Varity* case which was affirmed by the Supreme Court, the Eighth Circuit held that the plaintiffs, a retired class of former plan participants, were not entitled to compensatory damages in their E.R.I.S.A. action. However, the Eighth Circuit specifically held:

> "Rather, plaintiffs are entitled to receive the alternative form of relief offered to them by the district court at the conclusion of its Findings of Fact and Conclusions of

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[8] See also the Second Circuit case of *Donovan v. Bierwirth*, 754 F.2d 1049 (2nd Cir. 1985) cited in Shade which held:

> "the Trustees would be personally liable for the "losses," if any, suffered by the Plan as a result of their alleged breach of duty. While there can be a breach of duty without any "loss" to a plan, no loss to a plan will result in personal liability under section 409 without a breach of duty."

[9] 936 F.3d 746 (8th Cir. 1994).

> Law filed on March 26, 1993. The retired class should receive $696,195.00, an award in the nature of restitution, to compensate them for benefits for which, at the time of trial, they had been deprived. The retired class should also receive restitution for benefits accrued between the time of trial and the entry of a final decree on remand." *Howe v. Varity*, 36 F.3d 746, 756.

The Supreme Court affirmed the aforementioned award which involved a transfer of money. Plaintiff is not asking for anything more than what the aggrieved persons received in *Varity*. Plaintiff is asking that his interest in the subject benefit plan to be made "whole". Plaintiff is requesting to be put back in the position he would have occupied, but for the breach. In affirming *Varity*, the Supreme Court stated:

> "The statute authorizes "*appropriate*" equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others."
>
> • • •
>
> The plaintiffs in this case could not proceed under the *first* subsection, (i.e. a claim for benefits pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(a)(1)(B)) because they were no longer members of the Massey-Ferguson plan and, therefore, had no "benefits due [them] . . ." They could not proceed under the *second* subsection (E.R.I.S.A. 29 U.S.C.S. § 1132(2)) tied to § 409 (E.R.I.S.A. 29 U.S.C.S. § 1109) does not provide a remedy for individual beneficiaries. They must rely on the *third* subsection (29 U.S.C.S. § 1132(a)(3)) or they have no remedy at all. We are not aware of any E.R.I.S.A.-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is

> consistent with the literal language of the statute, the Act's purposes, and preexisting trust law." (Emphasis added; *Varity*, 516 U.S. 489, 515)

Plaintiff respectfully submits that clearly E.R.I.S.A. law recognizes "make whole" relief or returning all parties to the status quo in the event of a breach of fiduciary duty. Plaintiff asks for nothing more than the types of relief recognized by the courts in *Rego, Shade* and *Varity*.

In the *Rego* case set forth above, it was clear to the court that *Rego* was not, in reality, seeking "make whole" relief. Instead, *Rego*, who was no longer a participant in the plan, was seeking damages. The Plaintiff is still an active participant in the plan. Plaintiff does not wish for the court to award him any money, but he simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty. The court could accomplish the Plaintiff's desire in several different ways. First, the court could simply order the Defendants to reimburse to the plan amounts necessary so that Plaintiff's interest in the plan is what it should have been, but for the breach of fiduciary duty. Such an order would be nothing more than a classic situation where the plan is being made whole. Conversely, the court could conceivably structure an order whereby the plan is ordered to process the transaction that Plaintiff requested to be processed several years ago. Such a remedy is conceivable and would be nearly identical to the remedy recognized by the Fourth Court in *Griggs v. E. I. DuPont de Nemours & Company*.[10] In *Griggs*, the court held:

> "In sum, we conclude that the district court properly determined that Griggs' negligent misrepresentation claim is preempted by ERISA. We likewise affirm the district court's determination that DuPont breached its fiduciary duty to Griggs under ERISA. However, we conclude that

[10] 237 F.3d 371 (4th Cir. 2001.

> the return or reinstatement of the parties to their pre-election positions is not necessarily an inappropriate remedy under these circumstances, and we remand for the district court to further develop this issue." *Griggs*, 237 F.3d 371, 386.

Plaintiff's goal is to return the parties to the status quo and there are several ways the court could accomplish that goal if the court finds that the Defendants' breached their fiduciary duty. Plaintiff respectfully submits that, obviously, on a Fed.R.Civ.P. 12(c) motion the court is constrained to looking at the face of the Plaintiff's complaint. On the face of the Plaintiff's complaint, it is apparent that the Plaintiff has asked for relief which has been recognized under E.R.I.S.A. which is "make whole" or other equitable relief pursuant to E.R.I.S.A. Plaintiff respectfully submits that it would be unfair and improper at this juncture to dismiss the Plaintiff's complaint on the face of the complaint when Plaintiff has clearly plead relief which is allowable under E.R.I.S.A. The Defendants are speculating that the Plaintiff wants "money damages", but Plaintiff has never requested such damages nor does he seek such damages. Plaintiff truly and sincerely wants whatever equitable relief the court might later choose to employ to simply put him in the position he would have been in the plan in which he still participates, but for the breach of fiduciary duty. It may be that ultimately the court concludes that there was, in reality, no breach of fiduciary duty or if the court finds there was a breach of fiduciary duty, the court may well come to the conclusion that it cannot construct a remedy, but Plaintiff does not believe that such will be the case. What is apparent, however, is that Plaintiff should be entitled to present the facts to the court so that the court can decide whether there was a breach of fiduciary duty and whether the court can construct an equitable remedy therefore.

Also, the Defendants' motion to dismiss fails to recognize that the Plaintiff also plead entitlement to a statutory penalty pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(c)[11] for failure of the Defendant to provide requested information. Accordingly, even if the court was inclined to grant the Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(c), it is apparent that there would still be issues existing for resolution by the court on the Plaintiff's 29 U.S.C.S. § 1132(c) request for a penalty.[12] Since the court is going to consider certain aspects of the Plaintiff's case in any event, then Plaintiff respectfully submits that it only makes sense for the court to consider all aspects of the Plaintiff's complaint and such is especially true since the Plaintiff has narrowly and specifically requested a type of relief that is recognized under E.R.I.S.A. for breach of fiduciary duty.

Accordingly, Plaintiff respectfully requests that the court deny the Defendants' motion to dismiss.

---

[11] See Plaintiff's complaint, XVIII and ¶ XVII.

[12] 29 U.S.C.S. § 1132(c) provides:

> "(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form. (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 USCS § 1166(1) or (4)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper."

STATEMENT AS TO ORAL ARGUMENT

Plaintiff is available to address the court in any more detail as the court may desire at the court's convenience.

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(4)

Supreme Court, U.S.
FILED
FEB - 8 2007
OFFICE OF THE CLERK

No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case provides an ideal vehicle for resolution by this Court of two important questions of federal law that have vexed the lower courts. As respondents themselves are forced to concede:

- The United States has explicitly recognized that both questions presented are "of exceptional importance."
- The United States has explicitly recognized that both questions presented have split the circuits.
- The United States has explicitly recognized that both questions were wrongly decided in this case.

Respondents advance three unpersuasive reasons why this Court should nonetheless deny the petition. First, respondents contend that both questions presented have already been settled by this Court. As explained *infra* (at 2-4, 8-9), this contention is unfounded. Second, respondents dispute the United States' position that both questions presented are of exceptional importance and have split the circuits. As explained *infra* (at 4-7, 9-10), respondents are wrong. Finally, respondents advance several merits-based arguments in support of the Fourth Circuit's resolution of both questions presented. Of course, petitioner disagrees with these merits-based arguments[1] and will respond in detail if this Court grants review. But for present purposes, the

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[1] For example, respondents do not attempt to refute – much less, address – the United States' argument that the Fourth Circuit's resolution of the 502(a)(2) Question directly contravenes the plain meaning of the statute. *See* Sec'y of Labor Amicus Br. in Support of Petition for Rehearing and Rehearing *En Banc* at 4-11, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359 (CA4 2006) (No. 05-1756), 2006 WL 2050799 (hereinafter, "U.S. *LaRue* Br."); *see also* Pet. 13-15 (advancing the argument of the United States that "the panel's resolution of the 502(a)(2) Question is 'unsupported under the statute.'"); Seven Law Professors Amici Br. in Support of Petitioner at 4-8 (hereinafter, "Law Prof. Br.") (cogently explaining and advocating the position advanced by the United States on the 502(a)(2) Question)).

significance of these arguments and their responses is that they replicate the fundamental differences among the views of the lower federal courts and highlight the need for immediate resolution by this Court.[2]

I. THE 502(a)(2) QUESTION MERITS REVIEW.

A. The 502(a)(2) Question is an open one.

Respondents' principal argument against review of the first question presented is that "[t]he court of appeals' resolution of the 502(a)(2) Question is a straightforward and unremarkable application of controlling [Supreme Court] precedent." BIO 5. Respondents' position is unfounded.

The only time that this Court interpreted the scope of § 502(a)(2) was over twenty years ago in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985).[3]

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[2] Unsurprisingly, respondents do not seriously argue that this case is an inappropriate vehicle for resolution of either question presented. With respect to the 502(a)(2) Question, respondents do claim (in passing) that "Petitioner's § 502(a)(2) claim was made for the first time on appeal." BIO 5. As thoroughly explained by *amici* law professors, however, "the Fourth Circuit declined to rest its holding on an alternative fact-bound argument (*i.e.*, waiver) advanced by the respondents, instead resting its holding exclusively on its interpretation of Section 502(a)(2)." Law Prof. Br. 15. Respondents concede as much when they note (BIO 5) that the Fourth Circuit merely "*suggest[ed]* this claim may have been waived" and then proceeded to decide the 502(a)(2) Question on the merits. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (observing that any issue "pressed *or* passed upon below" is appropriate for review (emphasis added)). In any event, respondents' suggestion that petitioner did not raise the 502(a)(2) Question in the district court is factually wrong, as evidenced by the very documents attached by respondents to their BIO. *See, e.g.*, BIO App. 47a (petitioner's reply to respondents' motion to dismiss) (quoting and describing *the precise statutory language at issue in the 502(a)(2) Question* as "legally, exactly on point").

[3] Like the instant case, *Russell* involved a dispute over the scope of § 502(a)(2) and turned on the interpretation of certain language in § 409(a). That, however, is where the similarities between the two cases end. The case at bar turns on the question of what constitutes a "loss[] to [an individual account] plan" for purposes of the requirement in § 409(a) that a breaching fiduciary "shall be personally liable to make good to

In arguing that the 502(a)(2) Question is controlled by *Russell*, respondents seize upon the pronouncement in that case that a "recovery for a violation of § 409 [must] inure[] to the benefit of the plan as a whole." *Id.* at 140. As respondents are well aware, however, there is widespread disagreement regarding what constitutes a recovery that "inures to the benefit of the plan as a whole" *in the context of individual account plans. Id.*

For example, the United States has long taken the precise position urged by petitioner in this case that the diminution in value of even a single participant's interest in an individual account plan constitutes a "loss[] to the plan" under § 409(a) and is remediable under § 502(a)(2).[4] The United States has repeatedly explained why this is consistent with *Russell:*

> The district court made too much of *Russell's* reference to "the plan as a whole" in concluding that relief under section § 409 is not available. * * * *Russell* was simply distinguishing * * * relief paid directly to the plan for losses that occurred inside the plan (such as damages for plan asset mismanagement) from relief to be paid directly to individuals for losses occurring outside of the plan (such as damages for personal pain and suffering caused by a benefit payment delay).[5]

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such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). At issue in *Russell* was the question of whether damages for personal injuries—as opposed to plan losses—were recoverable under §§ 502(a)(2) and 409(a).

[4] *See, e.g.*, U.S. *LaRue* Br. 7-8 (arguing that "if a fiduciary pockets even a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and has suffered a loss under ERISA's plain language" and that "there is no principled way to distinguish between the wrongful failure to pay a single participant's contribution into a plan and the wrongful failure to carry out a single participant's directed investment instructions.").

[5] *E.g.*, Sec'y of Labor Amicus Br. at 12, *Milosfsky v. American Airlines, Inc.*, 418 F.3d 429 (CA5 2005) (No. 03-11087), *available at*

Respondents' characterization of the Fourth Circuit's resolution of the 502(a)(2) Question as "a *straightforward* and *unremarkable* application of" *Russell* is particularly meritless given that the United States argued vigorously against such an application *in this very case*:

> Contrary to the panel's decision, allowing LaRue's suit to proceed under section 502(a)(2) is entirely consistent with the Supreme Court's decision in *Russell* in which the Court stated that a recovery under section 502(a)(2) must "inure[] to the benefit of the plan as a whole." * * * [W]hen the Supreme Court stated in *Russell* that recoveries under sections 409 and 502(a)(2) must "inure[] to the benefit of the plan as a whole," there is every reason to believe that the Court had in mind suits, such as this one [by petitioner], where, if the plaintiffs' allegations are true, the plan holds fewer assets in trust due to the fiduciaries' mismanagement of the investment of some of the plan's assets, and thus has suffered "losses" under section 409.

U.S. *LaRue* Br. 10-11 (quoting *Russell*, 473 U.S. at 140).

B. The 502(a)(2) Question has split the circuits.

Respondents concede, as they must, that the United States has taken the position that the Fourth Circuit created a circuit split on the 502(a)(2) Question. BIO 7; U.S. *LaRue* Br. 11-14 (arguing that the Fourth Circuit decision in this case "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits.").

Respondents argue, however, that the United States is wrong and that "[t]he court of appeals' determination of the 502(a)(2) Question does not create a circuit conflict." BIO 7. According to respondents, there is no conflict because the cases cited by the United States "involve actions brought on

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http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.pdf (hereinafter, "U.S. *Milofsky* Br.").

behalf of a class of similarly-situated participants and/or on behalf of the plan itself, in factual scenarios where the alleged fiduciary breach involved misbehavior affecting a considerable segment of plan participants." *Id.*

As an initial matter, it bears mention that respondents' claim that the cases cited by the United States involved "factual scenarios where the alleged fiduciary breach involved misbehavior affecting a *considerable segment* of plan participants" is yet another shocking misrepresentation. In *Milofsky v. American Airlines, Inc.*, for example, a panel of the Fifth Circuit noted that the lawsuit was brought by "*a small segment* of the employees" in the plan and that the claim "by its very nature, can only benefit them." 404 F.3d 338, 345 (CA5 2005) (emphasis added), *rev'd en banc*, 442 F.3d 311 (CA5 2006). The panel went on to make clear that the case was *not* one "affecting a *considerable segment* of plan participants" when it wrote:

> We need not speculate on every possible situation in which a suit that demands relief beneficial to a large proportion of the beneficiaries can reasonably be said to "protect the entire plan." Instead, it is enough to say, for present purposes, that the specific relief here requested, affecting only 218 individual accounts out of a much larger plan, is much too narrow to qualify.

Id.

To be sure, respondents are correct in their observation that the Third, Fifth, Sixth, and Seventh Circuit cases cited by the United States—unlike the case at bar—involve more than just one aggrieved plan participant. But as explained by *amici* law professors, this "distinction misses the point" because "the *reasoning* employed by these other courts of appeals would directly foreclose the position adopted by the Fourth Circuit in this case." Law Prof. Br. 12, 13 (emphasis in original). Put simply, the same reasoning that permitted

218 pilots in the $4 billion plan[6] sponsored by an employer with over 85,000 employees[7] to sue under § 502(a)(2) to recover plan losses attributable to their 218 individual accounts in *Milofsky* would necessarily permit a single individual (*i.e.*, petitioner) in a small plan sponsored by an employer with only 300 employees[8] to sue under § 502(a)(2) to recover plan losses attributable to his individual account in this case.

C. The 502(a)(2) Question is exceptionally important.

Respondents' final argument against review of the first question presented is that "[t]he § 502(a)(2) Question is not an issue of exceptional importance." BIO 9. The manifest importance of the question, however, is evidenced by respondents' failure to contest the following empirical claims made in the petition:

- "*[A]pproximately $3 trillion in assets*—more than half of all private pension funds in this country—are currently held by defined contribution plans like the 401(k) plan in this case." Pet. 12.
- "Under the Fourth Circuit's interpretation of 502(a)(2), the breaching fiduciary of a 'defined contribution plan' will now enjoy total immunity from personal liability for monetary losses caused by even the most egregious violation of ERISA provided that the fiduciary's misconduct has only depleted the retirement funds of a single participant in the plan." *Id.* at 11.

Rather than contest these unassailable claims, respondents attempt to minimize their importance by suggesting that the Fourth Circuit's resolution of the

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[6] *See* AMR Corp., Annual Report (Form 11-K), at 7 (Dec. 31, 2002), *available at* http://www.secinfo.com/d61m.219.htm.

[7] *See* Yahoo! Finance Profile for AMR Corp., http://finance.yahoo.com/q/pr?s=AMR.

[8] *See* Introduction to DeWolff, Boberg & Assocs., http://www.dewolffboberg.com/abt_intro.htm.

502(a)(2) Question will not apply to cases in which more than one participant seeks relief under the statute. BIO 9-10 (stating that "[a]lthough the Secretary of Labor also hypothesized collateral consequences in her *amicus* brief supporting the petition for rehearing, the Secretary's larger concern clearly focuses on the ability of a *group* of plan participants to bring a § 502(a)(2) claim to recover monetary losses to the plan * * * But the court of appeals' decisions gives no reasons for the Secretary's disquietude.")

Respondents' characterization of the scope of the Fourth Circuit's holding is simply wrong. *See* Pet. 12 n.25 (quoting the United States' explanation regarding the inability to "draw a line between this case and the many other cases involving" groups). Indeed, the Fourth Circuit's decision has already been applied where more than one participant sought relief under the statute. *See Tullis v. UMB Bank, N.A.*, — F. Supp. 2d —, 2006 WL 3392749, *3-*5 (N.D. Ohio Nov. 21, 2006). But even if respondents' characterization were correct, the 502(a)(2) Question would nonetheless be of sufficient importance to warrant immediate review by this Court. As explained in the petition, the risk of "'single-participant' monetary losses resulting from fiduciary breach inheres in a 'defined contribution plan.'" Pet. 11. Respondents do not even attempt to dispute this fact or its significance. Nor could they. Approximately 91 percent of all private retirement plans have fewer than 100 participants. These 632,520 plans have $360 billion in assets and cover 14 percent of all active participants, approximately 9.2 million people. *See A More Secure Retirement for Workers: Proposals for ERISA Reform: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. and the Workforce*, 106th Cong., 2d Sess. (2000) (statement of John Hotz, Deputy Director, Pension Rights Center), 2000 WL 276410.[9]

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[9] Respondents also suggest that victims of a fiduciary breach can still seek non-monetary remedies such as removal of a breaching fiduciary.

II. THE 502(a)(3) QUESTION MERITS REVIEW.

A. The 502(a)(3) Question is an open one that has split the circuits.

Respondents' first argument against review of the 502(a)(3) Question is that the court of appeals' holding is compelled by this Court's decisions in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). BIO 13. Once again, respondents are mistaken. As explained in the petition, the United States Solicitor General advanced in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004)—a case post-dating both *Mertens* and *Great-West*—the precise interpretation of 502(a)(3) urged by petitioner in this case.[10] Although the *Aetna* Court did not reach the 502(a)(3) Question, it made clear that the issue was very much an open one.[11]

See BIO 9; *see also id.* at 2, 13 (suggesting that "Petitioner could have sought injunctive relief 'compelling compliance with his investment instructions.'"). Such remedies are of little value to those—like petitioner—who have *already* incurred monetary losses as a result of fiduciary misconduct or negligence. Respondents suggest that the lack of any monetary remedy was a considered decision made by Congress. Such a claim—one that petitioner disputes—goes to the *merits* of the 502(a)(2) Question, not to its importance.

[10] It is the position of the United States and petitioner that the remedy of "surcharge"—*i.e.*, "make whole" monetary relief against a breaching fiduciary—satisfies the strict test established in *Mertens* and clarified in *Great-West*. *See* U.S. Amicus Br. at 27-28 n. 13, *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (Nos. 02-1845 & 03-83), 2003 WL 23011479.

[11] *See, e.g.*, Michael H. Bernstein, *A New Battleground for Patient Suits Against HMOs? We May Not Have Heard the End of ERISA Litigation Concerning So-Called Negligent Benefit Denials*, 178 N.J.L.J. 1048 (2004) (noting that in the "landmark decision" of *Aetna* "[t]he Supreme Court scrupulously avoided a discussion of potential liability under ERISA § 502(a)(3) and § 502(a)(2). However, given footnotes 1 and 7 of Justice Thomas' opinion, along with the concurring opinion of Justice Ginsburg concerning possible remedies available under ERISA

Respondents argue that "*Aetna* neither opened any doors to the 502(a)(3) Question nor challenged this Court's well-established decisions in both *Mertens* and *Great-West*." BIO 14. To be sure, respondents' narrow reading of *Mertens* and *Great-West* has now been adopted by three courts of appeals including the Fourth Circuit in this case. But it has also been expressly rejected by the United States,[12] leading scholars,[13] and the Seventh Circuit.[14]

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§ 502(a)(3), these two sections may become the new battleground for plan participants").

[12] Since *Aetna*, the United States Department of Labor has advanced its interpretation of 502(a)(3) before the First, Second, Fourth, Fifth, Seventh, Ninth Circuits, and Tenth Circuits. *See* Sec'y of Labor Amicus Br., *Green v. Exxonmobile Corp.*, 470 F.3d 415 (CA1 2006) (No. 06-1452), 2006 WL 3226460; Sec'y of Labor Amicus Br., *Coan v. Kaufman*, 457 F.3d 250 (CA2 2006) (No. 04-5173), 2005 WL 5071038; Sec'y of Labor Amicus Br., *Pereira v. Farace*, 413 F.3d 330 (CA2 2005) (Nos. 03-5035, 03-5055), *available at* http://www.dol.gov/sol/media/briefs/pereirabrief.pdf; U.S. *LaRue* Br. (CA4); U.S. *Milofsky* Br. (CA5); Sec'y of Labor Amicus Br., *Ostler v. OCE-USA, Inc.*, No. 01-3801 (CA7 Feb. 8, 2002), 2002 WL 32305162; Sec'y of Labor Amicus Br., *Goeres v. Charles Schwab & Co.*, No. 05-15282 (CA9 July 12, 2005), *available at* http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf; Sec'y of Labor Amicus Br., *Callery v. United States Life Ins. Co. in the City of New York*, 392 F.3d 401 (CA10 2004) (No. 03-4097), 2003 WL 24309395.

[13] *See, e.g.*, Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827 (2006) (arguing in favor of the United States' position and noting that "[t]he Supreme Court's major prior precedents interpreting Section 502(a)(3), when stripped of superfluous *dicta* [are] consistent with * * * the Department of Labor's long-standing litigation position.").

[14] As explained in the Petition, the United States has acknowledged the circuit split on this issue. Pet. 23-24. Respondents argue that "*Great-West* effectively eliminated any conflict over this issue" and that the United States' assertion of a split "rel[ies] chiefly on two appellate court decisions issued before *Great-West*." BIO 12. Notably, respondents fail to dispute (or even mention) that "[t]he Seventh Circuit recently reaffirmed its position." Pet. 24.

B. The 502(a)(3) Question is exceptionally important.

The extraordinary importance of the 502(a)(3) Question cannot credibly be denied. As the American Association of Retired Persons (AARP) recently noted, resolution of the 502(a)(3) Question

> will have a direct and vital bearing on the ability of [the 35+ million] AARP members and other Americans to police and protect their pension plans from mismanagement and to ensure monies for those benefits which will foster their economic security.[15]

Nonetheless, respondents assert that the 502(a)(3) Question is not of exceptional importance. But respondents' only support for this claim is the implausible contention that "[t]he Secretary did not request reconsideration of the 502(a)(3) Question in her *amicus* filing in the court of appeals, suggesting no institutional concern regarding the court of appeals' determination of this issue." BIO 12. As demonstrated *supra* (at 9 n.12), the Secretary has made litigation of the 502(a)(3) Question a top priority. Moreover, the Secretary elected to assert the position of the United States on the 502(a)(3) Question in this very case notwithstanding that *petitioner* had decided not to seek rehearing on that issue before the Fourth Circuit.[16]

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

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[15] AARP Amicus Br. at 2, *Coan v. Kaufman*, 457 F.3d 250 (CA2 2006) (No. 04-5173), 2005 WL 5071037.

[16] *See* U.S. *LaRue* Br. 11 ("Although it is not an issue on rehearing, the Secretary also disagrees with the panel's conclusion that section 502(a)(3) likewise precludes the recovery of monetary losses for a fiduciary breach. Instead, it is the Secretary's position that make-whole relief against a breaching fiduciary, known in equity as 'surcharge,' is available under section 502(a)(3).").

Respectfully submitted.

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IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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IN THE

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No. 06-856

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DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General advances several arguments in support of his recommendation that this Court grant *certiorari*. None of them is persuasive. Instead, they confirm Respondent's view that the larger concerns identified by the government are more appropriately left to Congress.

A. The question about the scope of ERISA Section 502(a)(2) does not warrant this Court's review.

1. The Solicitor General theorizes that Petitioner might have had a claim under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), even though Petitioner did not proceed under

that provision. Although Petitioner sought relief exclusively in the form of alleged lost profits in his individual plan account, measured by the ostensible greater investment return he would have achieved had the plan fiduciaries acted promptly on his requests to change certain mutual fund investments,[1] the Solicitor General would regard that as an effort to recover "losses to the plan" within the meaning of ERISA Section 409(a), 29 U.S.C. § 1109(a). The theory is that, because Petitioner's individual account is held in a "unitary trust," the claimed reduction to Petitioner's individual plan account is actually a loss to the plan. U.S. Br. 6. The Solicitor General then hypothesizes that a recovery for the individual would inure to the benefit of the plan as a whole because it "may be used" to defray the plan's operating costs. U.S. Br. 7. The argument does not withstand scrutiny.

In urging a theory never advanced by Petitioner below, the Solicitor General is in the awkward position of advocating a result not sought by Petitioner. In the district court, Petitioner sought only "make whole" or other equitable relief under ERISA Section 502(a)(3), to obtain a monetary recovery following an alleged delay in processing his requests to change certain investments. Pet. App. 3a. The money was to be given to him, as make whole relief, and not to the plan. Petitioner advanced no claim under ERISA Section 502(a)(2), explicitly or otherwise.[2] Petitioner neither sought to recover

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[1] This damages theory is, of course, asymmetrical. If the plan is tardy in executing an investment change directed by the participant (or if the change is negligently not executed as directed), and the change in hindsight turns out to have yielded a better investment return, the participant can claim the lost profit as damages. Of course, if the change turns out to be ill-advised, because investment returns would have been lower had the change been executed, the participant will happily overlook the mistake.

[2] The Solicitor General is correct in acknowledging that § 502(a)(2) was not raised by Petitioner in the district court. Petitioner's contrary assertion in his reply brief, Pet. Rep. Br. 2, n.2, is demonstrably incorrect and misleading.

losses allegedly sustained by any other plan participants; nor did he seek relief on behalf of the plan or bring suit in any representative capacity. To be sure, in language that is arguably dicta, the Fourth Circuit entertained Petitioner's § 502(a)(2) argument.[3] But Petitioner did not make the argument that the Solicitor General tenders to this Court. In the Fourth Circuit, Petitioner argued that the prayer for relief in his complaint, which sought "make whole" relief, Br. in Opp. App. 4a, could nonetheless be interpreted as seeking a remedy to the plan, because Petitioner was still a plan participant.[4] Brief for Plaintiff-Appellant, *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570 (No. 05-1756) 2004 WL 3545170 (Sept. 16, 2004). Petitioner did not advance the specific theory now suggested by the Solicitor General. Nor Petitioner did pursue the outcome suggested by the Solicitor General, in which the putative recovery would go into the plan to be available for payment of plan expenses before the remainder (in some indeterminable amount) would be distributed to Petitioner's individual account.

The Solicitor General's theory is ill-conceived because Petitioner's claim does not involve a "loss to the plan" under any conventional approach to statutory interpretation. ERISA Section 409 authorizes only a claim that "inures to the benefit

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[3] In suggesting that Petitioner sought recovery to the plan in the district court, the government quotes language in a brief filed by Petitioner in that court. U.S. Br. 5. The reference is inaccurate. The quoted language was Petitioner's effort to distinguish *Rego v. Westvaco Corporation et al.*, 319 F.3d 140 (4th Cir. 2003), controlling Fourth Circuit precedent on the scope of "appropriate equitable relief" within the meaning of Section 502(a)(3). Br. in Opp. App. 50a. By definition, any damages relief available under Section 502(a)(3) goes to the plan participant or beneficiary, rather than to the plan.

[4] That theory is of no help to either Petitioner or the Solicitor General with respect to § 502(a)(2), as "make whole relief" is an inherently individual concept of equitable relief. *See Abermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

of the plan as a whole." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 140 (1985). The aggregation of individual plan accounts in a defined contribution plan does not convert Petitioner's personal claim into an action to recover losses "to the plan." In suggesting otherwise, the Solicitor General imagines a sort of straw transaction, in which the putative recovery would pass through the plan, strictly as a legal fiction, in order to end up in Petitioner's individual plan account.[5]

The government's suggestion is speculative in any event. Money recovered by a trust typically cannot be "earmarked" for a particular beneficiary, unless such an allocation is specifically provided by the plan document. In a defined contribution plan, any recovery presumptively would go to the plan to be allocated among all the participants.[6] ERISA fiduciaries are obligated to act strictly in accordance with the terms of the plan documents and other instruments creating ERISA plans. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (a)(1)(D). The specific terms of the plan document necessarily govern questions of this sort. *See, e.g., Hunt v. Hawthorne Associates Inc.*, 119 F.3d 888, 892, n.3 (11th Cir. 1997) (when determining whether a breach of fiduciary duty has occurred in the course of plan administration, the plan documents are of "seminal importance"). The plan document is not in the record, because these arguments were never raised below. Accordingly, this Court cannot properly assess

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[5] This construct reveals the Solicitor General's unstated premise that any recovery should actually pass directly to Petitioner, outside the plan. That premise is, of course, consistent with the damages relief actually sought by Petitioner. But the government cannot say this explicitly, as it would be fatal to its argument.

[6] The Solicitor General misreads the Department of Labor's Field Assistance Bulletin. U.S. Br. 6. Nothing in that regulatory guidance endorses the specific form of allocation suggested by the government; nor could it trump the specific language of the plan document.

how the plan would allocate the recovery hypothesized by the Solicitor General.[7]

More broadly, there is nothing surprising about Congress' choice that § 502(a)(2) is available only to recover losses to the plan, and not individual complaints. The passage of time has confirmed the wisdom of this Court's conclusion in *Russell* that a "fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." 473 U.S. at 142. The Solicitor General suggests no compelling reason to reexamine *Russell*. The government's position is fundamentally at odds with this Court's teaching in *Russell* that an interpretation of § 502(a)(2) to allow recovery of alleged losses suffered by an individual plan participant would effectively obliterate the distinction Congress made in specifically providing for plan remedies in § 502(a)(2) and for individual remedies in § 502(a)(1) and § 502(a)(3). 473 U.S. at 144. And the Solicitor General's argument is ironic in that Petitioner correctly understood that § 502(a)(2) would not provide the individual relief he sought, which is why Petitioner proceeded exclusively under § 502(a)(3).

2. The Solicitor General is likewise incorrect (U.S. Br. 8-9) in suggesting that the Fourth Circuit's decision creates an actual circuit conflict on the § 502(a)(2) issue. None of

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[7] Because the case was resolved on a motion for judgment on the pleadings, and solely on the § 502(a)(3) theory pleaded by Petitioner, the record is inadequate in other respects. The record does not describe the specific investment choices requested by Petitioner, whether his requests were honored in whole or in part, or whether he subsequently changed his mind. There is nothing to indicate the length of, or explanation for, the alleged delay in processing Petitioner's investment directions. The answers to these questions, and perhaps others, would be critical to the fact-intensive inquiry necessary to assess whether the damages claimed by Petitioner was in some broader sense an injury to the plan.

the cases cited by the Solicitor General directly holds that an individual may bring a § 502(a)(2) claim solely on behalf of his own interests. To the contrary, those cases support Respondent's position that, consistent with *Russell*, § 502(a)(2) permits an action only on behalf of the plan.

For example, in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995) in which a subclass of plan participants sued for a breach of fiduciary duty, the court observed: "Although an individual may bring a § 1109 claim, this court has repeatedly held that ERISA does not permit recovery by an individual who claims a breach of fiduciary duty." *Id.* at 1452-53. Similarly, in *Steinman v. Hicks*, 352 F.3d 1101 (2003), the Seventh Circuit did not "reject" the district court's analysis that an individual could not recover his individual losses. Instead, the court's analysis of § 502(a)(2) was limited to determining that plaintiffs' claims were appropriate under that provision of ERISA because they were seeking relief for losses to the plan, "whereas § 502(a)(3) is the vehicle for suits by individuals who are seeking relief on their own behalf." *Id.* at 1102. *Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231 (3d Cir. 2005) is likewise consistent with the Fourth Circuit's decision below. Plaintiffs in that case alleged that the company failed to disclose that it had unlawfully and artificially inflated company shares that the company offered as part of a savings plan. In finding that the action was appropriate under § 502(a)(2) the Court reasoned, "the recovery . . . would go to the Plan as a whole to be held in accordance with the terms of the plan, including the payment of operating expenses and the like, which would redound to the benefit of all participants." *Id.* at n. 4.

3. The Solicitor General's suggestion that the Fourth Circuit's decision will result in calamitous outcomes is also misplaced. ERISA provides a range of effective remedies to address systemic or other widespread fiduciary breach situations. Cases like *Schering Plough* and *Milofsky v.*

American Airlines, 404 F.3d 338 (5th Cir. 2005), *rev'd on reh'g en banc*, 442 F.3d 311 (2006) demonstrate that § 502(a)(2) is available in appropriate cases involving allegations of systemic fiduciary breach, including cases presenting the issue expressed by the government about misrepresentations that adversely affect the price of publicly-traded stock held by participants in defined contribution plans. And this Court's decision last Term in *Sereboff v. Mid-Atlantic Med. Svcs., Inc.* 126 S. Ct. 1869 (2006), reconfirms the availability of restitution as "appropriate equitable relief" available under § 502(a)(3). The concerns expressed by the Solicitor General with respect to allegations of systemic fiduciary breach are best saved for another day, in a case with a fully developed record that directly presents those issues.

B. The question about the scope of Section 502(a)(3) also does not warrant this Court's review.

1. The Solicitor General claims that the relief sought by Petitioner should be viewed as "appropriate equitable relief" within the meaning of ERISA § 502(a)(3), on the premise that an individual in Petitioner's circumstances would otherwise be without a remedy. U.S. Br. 19. That argument ignores the indisputable fact that Petitioner simply elected not to pursue any form of equitable relief traditionally available under § 502(a)(3), *e.g.*, a request for injunctive relief, because Petitioner was exclusively interested in a damages recovery. Br. in Opp. App. 4a.

The Solicitor General's suggestion that Petitioner's claim for money damages could be repackaged as a demand for surcharge is without merit. Changing the label does not change the fundamental nature of a claim. Nor would it convert a claim for money damages into "appropriate equitable relief" within the meaning of § 502(a)(3). *See McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996); *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1064 (8th Cir. 2006) ("Merely re-labeling the relief sought as 'restitution' or

'surcharge' does not alter the nature of a remedy from monetary to equitable"). It is telling that this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) nowhere includes surcharge in its list of remedies "typically" available in equity. *Id.* at 215 (listing "injunction," "mandamus," and "restitution" as catagories of relief typically available in equity).

It is probably true enough that courts of equity were historically capable of expanding the range of their equitable powers to make up for the fact that the divided bench often left equity courts incapable of assessing damages in a straightforward manner. But the modern understanding of the division between legal and equitable remedies—as reflected in ERISA—is much more clearly defined and rarely entails that kind of overlap. Adoption of the rule suggested by the Solicitor General—creation of an equitable remedy called "surcharge" that is in every respect a traditional damages remedy—would eviscerate the distinction reflected in the statute. *Mertens v. Hewitt Associates*, 508 U.S. 248, 257-58 (1993).

In any event, the Solicitor General is incorrect in asserting Fourth Circuit's decision "deepens an existing conflict among the court of appeals." U.S. Br. 16. The Solicitor General cites a case from the Seventh Circuit, *Bowerman v. Wal-Mart Stores, Inc.* 226 F.3d 574 (2000). *Bowerman* was issued two years before this Court's decision in *Great-West*, and merely concluded that monetary relief was appropriate there under the doctrine of restitution, a theory not available to Petitioner. *McDonald v. Household Int'l, Inc.*, 425 F.3d 424, 430 (7th Cir. 2005) simply quotes the concurrence in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), in dicta, while acknowledging that appellant may not recover consequential damages under ERISA. Contrary to the government's suggestion, courts have consistently held, both before and since *Great West*, that a pure claim for money damages is not available

under § 502(a)(3) in the absence of facts establishing restitution. *See, e.g., Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007); *Alexander v. Bosch Auto Sys., Inc.*, 2007 WL 1424299 (6th Cir. May 14, 2007); *Coan v. Kaufman*, 457 F.3d 250, 262-64 (2d Cir. 2006); *Calhoun v. TWA*, 400 F.3d 593, 596-98 (8th Cir. 2005); *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 405-09 (10th Cir. 2004) *cert. denied*, 126 S.Ct. 333 (2005); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481-82 (6th Cir. 2001) *cert. denied*, 535 U.S. 928 (2002).[8]

As this Court recognized in Mertens, "[ERISA is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all favors of potential plaintiffs." *Id.* at 262. This Court has been properly reluctant to imply additional remedies to participants in ERISA cases, to avoid upsetting the "interlocking, interrelated, and interdependent remedial scheme" contained in ERISA. *Russell*, 473 U.S. at 146. The remedy the Solicitor General advocates is similar to an amendment to

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[8] The Solicitor General's arguments that monetary relief should be available under § 503(a)(3) have been made unsuccessfully several times by the Department of Labor. *See, e.g.*, Brief for the Sec'y of Labor as *Amicus Curiae* supporting Appellant's Petition for Panel and En Banc Rehearing, *Pereira v. Farace*, 413 F.3d 330 (2nd Cir. 2005), *cert denied* (No. 03-11087) (July 25, 2005) available at http://www.dol.gov/sol/media/briefs/pereirabrief.pdf; Brief for the Sec'y of Labor as *Amicus Curiae* supporting Appellant and Requesting Reversal, *Goeres v. Charles Schwab & Co.*, 2007 WL 495191 (9th Cir. Feb. 14, 2007) (No. 05-15282) (July 11, 2005) available at http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf; Brief for the Sec'y of Labor as *Amicus Curiae* Supporting Appellant and Requesting Reversal, *Gallery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004), *cert denied* (No. 03-4097), 2003 WL 24309395 (March 25, 2005); Brief for the Sec'y of Labor as *Amicus Curiae* supporting Plaintiff-Appellant and Urging Reversal, *Coan v. Kaufman*, 457 F.3d 250 (2nd Cir. 2006) (No. 04-5173), 2005 WL 5071038 (August 20, 2003) (all arguing that money damages for breaches of the trust relationship were typically available in equity and therefore should be available under § 502(a)(3)).

ERISA proposed by former Senator Wellstone in S. 1919, 107th Cong. § 2 (2002). This case provides no compelling reason for this Court to amend the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 06-856

In the Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses affected only the participant's individual plan account.

2. Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). To that end, ERISA Section 502(a), 29 U.S.C. 1132(a) (2000 & Supp. IV 2004), provides "six carefully integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). As relevant here, Section 502(a)(2) provides that "[a] civil action may be brought" by a plan "participant"—as well as a beneficiary, plan fiduciary, or the Secretary of Labor—to obtain "appropriate relief" under ERISA Section 409 (29 U.S.C. 1109). 29 U.S.C. 1132(a)(2). Section 409(a), in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [Title I of ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach * * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a). The other enforcement provision at issue in this case, Section 502(a)(3), allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or the terms of the plan or "to obtain other appropriate equitable relief (i) to re-

dress such violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan." 29 U.S.C. 1132(a)(3).

2. Petitioner James LaRue is a participant in an ERISA-covered 401(k) pension plan sponsored by his employer, respondent DeWolff, Boberg & Associates, Inc. Pet. App. 2a; see 26 U.S.C. 401(k). Respondent administers the plan and, in fulfilling that role, acts as an ERISA fiduciary. *Ibid.* The plan is a "defined contribution" or "individual account plan." 29 U.S.C. 1002(34). In a defined contribution plan, the employer or employees make a fixed contribution to the plan, "which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. 1002(34); see *Nachman Corp.* v *PBGC*, 446 U.S. 359, 364 n.5 (1980). Although each participant has an individual account, all of the assets are held in trust by plan trustees who retain legal title to and authority over the assets. See 29 U.S.C. 1103(a); see Rev. Rul. 89-52, 1989-1 C.B. 110.

Under the plan, participants are permitted to choose from a number of investment options and to direct respondent, as plan administrator, to invest the amounts allocated to their individual accounts in specified percentages among those options. Pet. App. 2a. Petitioner claimed that, in 2001 and 2002, respondent failed to make certain investments that petitioner directed with respect to his account, causing a loss of approximately $150,000 to his "interest in the plan." Br. in Opp. App. 2a-4a. Claiming that respondent had breached its fiduciary obligations by failing to carry out his instructions, petitioner sought reimbursement of the resulting losses. *Id.* at 3a-4a; see *id.* at 50a (asking court to order respondent "to reimburse to the plan amounts necessary so that [petitioner's] interest in the plan is what it should have been, but for the breach of

fiduciary duty"). In his complaint, petitioner relied on ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), which authorizes "appropriate equitable relief." Br. in Opp. App. 3a-4a. Respondents, arguing that the monetary remedy sought by petitioner is unavailable under ERISA, moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court agreed and granted judgment for respondents. Pet. App. 15a-21a.

3. In the court of appeals, petitioner argued that respondents are liable for the $150,000 loss to the plan under ERISA Sections 502(a)(2) and 409(a), which together make a fiduciary liable for "losses to the plan" resulting from breaches of fiduciary duty. Petitioner also argued, as he had in the district court, that he was entitled to recover the losses to his account as appropriate equitable relief under Section 502(a)(3). The Fourth Circuit rejected both bases for recovery and affirmed the district court's judgment. Pet. App. 1a-14a.

The court of appeals held that, "[e]ven if the [Section 502(a)(2)] argument were not * * * waived," petitioner could not state a claim under that provision because "[r]ecovery under [Section 502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*,' not to particular persons with rights under the plan." Pet. App. 5a (quoting *Russell*, 473 U.S. at 140) (emphasis added by court of appeals). The court concluded that petitioner's suit would not benefit the plan for three reasons: (1) he sought "recovery to be paid into his plan account, an instrument that exists specifically for his benefit;" (2) "[t]he measure of that recovery is a loss suffered by him alone;" and (3) "that loss itself allegedly arose as the result of [respondent's] failure to follow [petitioner's] own particular instructions, thereby breaching a duty owed solely to him." *Id.* at 6a. The court stated that petitioner's suit was "different from a [Section 502(a)(2)] action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly

situated participants," because, in that other kind of case, the remedy "does not *solely* benefit the individual participants." *Ibid.* (citation omitted).

The court of appeals also held that petitioner could not state a claim under Section 502(a)(3). Pet. App. 7a-13a. In the court's view, petitioner's suit sought compensatory damages, which the court concluded were not available under Section 502(a)(3). *Id.* at 9a-10a. The court rejected petitioner's argument that he was seeking equitable relief because he was suing a fiduciary to recover losses caused by a fiduciary breach—relief that was historically available only in equity. *Id.* at 10a-13a. The court concluded that petitioner's argument was foreclosed by *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). Pet. App. 11a-13a.

4. Petitioner sought panel and en banc rehearing on the Section 502(a)(2) issue, and the Secretary of Labor filed an amicus brief in support of his petition. In an opinion denying the petition, the court reiterated its conclusion that petitioner could not proceed under Section 502(a)(2). Pet. App. 22a-29a.

DISCUSSION

This case presents this Court with the opportunity to resolve two important and recurring issues about the scope of the civil enforcement provisions of the ERISA. The Fourth Circuit held that ERISA Section 502(a)(2), 29 U.S.C. 1132(a)(2), does not permit a participant in a defined contribution pension plan to sue based on losses to the plan caused by a fiduciary breach when the losses affected only the participant's individual plan account. The court also held that such a participant cannot sue under Section 502(a)(3), 29 U.S.C. 1132(a)(3), to restore assets lost as a result of the fiduciary breach because such a suit does not seek "equitable relief" within the meaning of that provision. The court decided both issues incorrectly, and both issues have divided the courts of

appeals. Moreover, because of ERISA's expansive preemption provision, which broadly supersedes all state laws insofar as they relate to any ERISA plan, 29 U.S.C. 1144, the Fourth Circuit's decision threatens to leave many plan participants without any effective redress for breaches of ERISA's fiduciary duties. This Court's review is therefore warranted.

A. The Question About The Scope Of Section 502(a)(2) Warrants This Court's Review

1. The court of appeals erred in holding that Section 502(a)(2) does not authorize petitioner to sue to recover losses to his defined contribution plan account that were caused by respondent's alleged breach of fiduciary duty. Section 502(a)(2) authorizes a "participant" to bring suit for appropriate relief under ERISA Section 409. That section, in turn, imposes personal liability on any plan fiduciary for "any losses to the plan" resulting from "each * * * breach" of "any of the responsibilities, obligations, or duties imposed" by Title I of ERISA. 29 U.S.C. 1109(a). Petitioner's suit falls squarely within the text of those provisions. Petitioner has alleged that respondent, acting as a plan fiduciary, failed to invest assets in his plan account in accordance with his directions and that, as a result of that breach of fiduciary duty, the plan and his account within the plan held approximately $150,000 less than they would otherwise have held. Pet. App. 2a-3a; Br. in Opp. App. 3a-4a. Petitioner seeks an order requiring respondent "to reimburse to the plan amounts necessary so that [petitioner]'s interest in the plan is what it should have been, but for the breach of fiduciary duty." *Id.* at 50a. That is precisely what Sections 502(a)(2) and 409 authorize—a suit by a "participant" to recover for the plan "losses to the plan" resulting from a breach of fiduciary duty. 29 U.S.C. 1132(a)(2), 1109.

The court of appeals concluded (Pet. App. 5a-6a) that petitioner is not entitled to sue under Section 502(a)(2) only because the court misinterpreted *Massachusetts Mutual Life*

Insurance Co. v. *Russell*, 473 U.S. 134 (1985). *Russell* provides no barrier to a suit like petitioner's, in which a participant in a defined contribution plan seeks to recover *for the plan* losses caused by a fiduciary breach and manifested in the participant's plan account. The plaintiff in *Russell* was not seeking a recovery *payable to the plan* of losses to the plan. Instead, she sought compensatory and punitive damages payable *directly to her* as compensation for a delay in her receipt of disability benefit payments. *Id.* at 137-138. In holding that her suit was not authorized by Section 502(a)(2), the Court distinguished the relief that she sought—damages payable directly to her for pain and suffering—from relief payable to the plan to recoup "losses to the plan" arising from mismanagement of plan assets. 473 U.S. at 140-141 & n.8. The Court recognized that a recovery for the plan of losses arising from mismanagement of plan assets is available under Section 502(a)(2), see 473 U.S. at 140-141 & n.8, 142, 144, and it observed that such a recovery "inures to the benefit of the plan as a whole," *id.* at 140.

Petitioner is seeking the kind of recovery that *Russell* indicates is available under Section 502(a)(2), even though the ultimate effect of relief to the plan would be to increase the balance in petitioner's plan account. Petitioner seeks a payment to the plan equal to the "losses to the plan" that resulted from respondent's mismanagement of plan assets attributable to petitioner's account. That recovery will "benefit * * * the plan as a whole" in the sense that it will directly increase the overall amount of assets held by the plan. Indeed, a portion of the recovered assets, like any other assets of the plan, may be used by the plan to defray the operating costs of the entire plan. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003) <http://www.dol.gov/ebsa/regs/fab_2003-3.html> (discussing appropriate methods of allocating such expenses).

The court of appeals incorrectly reasoned that petitioner is not seeking recovery of losses to the plan on the grounds that the losses were suffered only by petitioner's plan account, and the recovery would be allocated to that account. See Pet. App. 6a. That reasoning misunderstands the nature of a defined contribution plan. By statutory design, the assets of a defined contribution plan are allocated, as a bookkeeping matter, to individual accounts within the plan for the beneficial interest of the participants (whose benefits are dependent on the amounts so allocated). 29 U.S.C. 1002(34). But the assets are nevertheless held in a unitary trust and legally owned by one or more trustees. See 29 U.S.C. 1103(a); 26 U.S.C. 401(a) (2000 & Supp. IV 2004); Rev. Rul. 89-52, 1989-1 C.B. 110. Thus, the necessary allocation of any recovery of plan losses to one or more individual accounts within the plan does not change their nature as "losses to the plan." Because the fiduciary breaches alleged here resulted in a reduction of the assets held by the plan's trust, and because the plan is legally entitled to recover the lost assets and to hold them to support the payment of benefits and plan expenses, the court of appeals erred in concluding that the recovery would "*solely* benefit" petitioner, see Pet. App. 6a (citation omitted).

The court of appeals also erred in concluding that petitioner's suit is not authorized by Section 502(a)(2) on the theory that the losses arose from an alleged breach of a "duty owed solely to him." Pet. App. 6a. Sections 502(a)(2) and 409 provide a remedy for the breach of "*any* of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA, not just those breaches that affect all or a majority of plan participants. 29 U.S.C. 1109(a) (emphasis added). Moreover, ERISA's fiduciary duties protect all plan assets and all plan participants. See 29 U.S.C. 1104(a). Thus, the duty to follow a participant's investment instructions was owed to all plan participants, not just petitioner.

2. This Court's review is warranted because the court of appeals' holding on the Section 502(a)(2) issue conflicts with the decision of every other court of appeals that has addressed that issue. Those courts have all held that Section 502(a)(2) authorizes suits by participants in defined contribution plans to recover losses caused by fiduciary breaches notwithstanding that the recovery will ultimately be allocated to the plan accounts of a limited number of participants.

The earliest decision is *Kuper* v. *Iovenko*, 66 F.3d 1447 (1995), in which the Sixth Circuit held that a subset of plan participants could sue under Sections 502(a)(2) and 409 to recover losses caused by a fiduciary breach that affected only their individual plan accounts. *Id.* at 1452-1453. The court reasoned that the "argument that a breach must harm the entire plan to give rise to liability under [Section 409] would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants." *Id.* at 1453.

The Seventh Circuit in *Steinman* v. *Hicks*, 352 F.3d 1101 (2003), likewise held that a subset of participants in an individual account plan may sue plan fiduciaries under Section 502(a)(2). The district court had ruled that the plaintiffs could not maintain their action under Section 502(a)(2) because they sought to "recover their individual losses * * * rather than suing on behalf of the * * * [p]lan." *Steinman* v. *Hicks*, 252 F. Supp. 2d 746, 756 (C.D. Ill. 2003). Although the Seventh Circuit affirmed on other grounds, it rejected that analysis. It held that the suit "clearly" arose under Section 502(a)(2) "because the plaintiffs are asking that the trustees be ordered to make good the losses to the plan caused by their having breached fiduciary obligations." 352 F.3d at 1102.

The Third Circuit agreed in *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231 (2005). The court held that the plaintiff could "seek money damages on behalf of the fund, notwithstanding the fact the alleged fiduciary violations af-

fected only a subset of the saving plan's participants." *Id.* at 232. The court reasoned that a "fiduciary's liability is not limited to plan 'losses that will ultimately redound to the benefit of all participants.'" *Id.* at 235 (citation omitted).

Similarly, the Fifth Circuit, sitting en banc, vacated a panel decision that had held that a subset of the participants in a 401(k) plan, who comprised less than one percent of all the plan participants, could not sue under Section 502(a)(2). The panel had reasoned that the plaintiffs sought to recover for breaches that were not, in the panel's view, "targeted [at] the plan as a whole." *Milofsky* v. *American Airlines, Inc.*, 404 F.3d 338, 343-344 & n.16 (5th Cir. 2005), vacated on reh'g en banc, 442 F.3d 311 (5th Cir. 2006). In a per curiam decision, the en banc court held that the claims should not have been dismissed. 442 F.3d at 313.

Contrary to the reasoning of the Fourth Circuit in this case (Pet. App. 6a, 26a-27a), those decisions are not distinguishable on the ground that they involved suits by a class or subset of plan participants rather than a single participant. Although the number of affected participants differs, the nature of the relief—the payment of money *to the plan*—is the same whether the recovery is allocated to the account of one participant, a number of participants, or every participant in the plan. The argument rejected by the other courts of appeals is, in substance, little different from the argument accepted by the Fourth Circuit here—that a participant may not sue under Section 502(a)(2) to recover losses caused by fiduciary breaches where the recovery will be allocated to his individual account. See, *e.g.*, *Schering-Plough*, 420 F.3d at 235 ("the fact that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"). In those cases, as here, any recovery would be allocated among only a fraction of the participants' accounts within the plan. Indeed, in *Milofsky*, in which the suit was

brought by only 218 participants in a plan with more than 85,000 members, the impact of the recovery on participant accounts was smaller on a percentage basis than in this case. Petitioner's account represents .33% of all plan accounts, as distinguished from the *Milofsky* plaintiffs' stake in .26% of plan accounts. This Court's review is warranted to resolve the conflict among the courts of appeals.[1]

3. This Court's review is also warranted because the question whether Section 502(a)(2) authorizes an individual participant in a defined contribution plan to sue to recover losses attributable to his plan account is an important one. The court of appeals' holding that such suits are not authorized imposes a significant and unwarranted limitation on the ability of participants in defined contribution plans to obtain redress for a violation of fiduciary duties. That limitation could skew decisions about the forms of plan benefits offered and selected, and would have a substantial impact on pension plan participants because defined contribution plans are the predominant type of pension plan in the United States and hold approximately $3.2 trillion in assets. See Board of Governors

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[1] The Fourth Circuit erred in asserting (Pet. App. 27a-28a) that a holding that petitioner may sue under Section 502(a)(2) would conflict with appellate decisions recognizing that a claim for individual loss is not cognizable under Section 502(a)(2). Almost all of the cases cited by the Fourth Circuit are cases in which plan participants or other individuals sought compensation *for themselves* rather than restoration of losses to the plan. *Smith* v. *Sydnor*, 184 F.3d 356 (4th Cir. 1999), cert. denied, 528 U.S. 1116 (2000), did involve a claim for restoration of losses *to the plan*, but the court of appeals permitted the suit to go forward. *Id.* at 363. The only other case that arguably involved a claim for losses to the plan is *Matassarin* v. *Lynch*, 174 F.3d 549 (5th Cir. 1999), cert. denied, 528 U.S. 1116 (2000). To the extent *Matassarin* suggests that Section 502(a)(2) does not authorize a suit to recover losses to a defined contribution plan that affected a subset of plan participants, that decision has been superseded by the Fifth Circuit's en banc ruling in *Milofsky*.

of the Fed. Reserve Sys., *Flow of Funds Accounts of the United States: Flows and Outstandings, Fourth Quarter 2006*, Statistical Release Z.1, at 113 (Mar. 8, 2007) <http://www.federalreserve.gov/releases/Z1/current/Z1.pdf>.

At a minimum, the court of appeals' decision will immunize fiduciaries operating in the Fourth Circuit from liability for breaches of fiduciary duty, no matter how egregious, so long as the breaches primarily involve the account of a single participant in a defined contribution plan. And the decision will leave plan fiduciaries, participants, and even the Secretary of Labor without the ability to recover losses caused by those breaches. Currently, the Secretary brings many cases each year against plan fiduciaries who fail to forward employee contributions to their plans. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Fact Sheet: Retirement Security Initiatives* (Jan. 2007) <http://www.dol.gov/ebsa/newsroom/fsecp.html>. In the Fourth Circuit, the Secretary may now be precluded from recovering losses caused by a fiduciary's deliberate diversion of contributions to a single participant's plan account, even though the plan clearly received fewer assets than its entitlement. Moreover, as petitioner notes (Pet'r Reply Br. 7), approximately 91% of all private retirement plans have fewer than 100 participants, and fiduciary breaches with respect to those plans will, therefore, affect correspondingly smaller numbers of participants. As a result, the impact of the decision below is likely to be significant even if it is given its narrowest possible reading as applying only to suits brought for the primary benefit of a single participant's account.

It is unlikely, however, that the decision will in fact be limited to cases that involve losses to a single participant's account. As discussed above, there is no statutory or logical basis on which to draw a line between a case involving losses to a single plan account and the many other cases involving

losses to the accounts of more than one, but less than all, of a plan's participants. Indeed, at least one district court has already employed the reasoning on which the court of appeals relied here to dismiss a suit that affected two plan accounts. *Tullis* v. *UMB Bank, N.A.*, 464 F. Supp. 2d 725 (N.D. Ohio 2006). And respondents suggest that relief under Section 502(a)(2) "can only be pursued where the alleged fiduciary breach affects a significant number of participants," Br. in Opp. 8, but offer no guidance on how courts are to determine what constitutes a "significant" number.

Thus, in contrast to the clear text of the statute, which allows a participant to sue to recover "*any* losses to the plan," 29 U.S.C. 1109(a) (emphasis added), the Fourth Circuit's decision establishes an unclear and unworkable standard. That uncertain standard will mire courts in litigation as they seek to draw a line between suits that are impermissible because they involve too few participants and suits that are permissible because the participants "serve as a legitimate proxy for the plan in its entirety." Pet. App. 6a. Moreover, the logic underlying the court of appeals' decision may ultimately result in a rule that Section 502(a)(2) suits are permissible for a defined contribution plan only if all or virtually all of the plan's participants have been affected by the breach. That will seldom be the case for 401(k) plans, which comprise the majority of all ERISA-covered pension plans, because those plans generally offer an array of investment options, and different participants elect different options. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin* 2, 44 (Mar. 2007) <http://www.dol.gov/ebsa/PDF/2004pensionplanbulletin.pdf>. Certainly it makes no sense to adopt a rule that would make the consequence of expanded employee choice a reduction in employees' ability to redress violations of fiduciary duties. Because the rule adopted by the court of appeals is likely to constrict signifi-

cantly the available relief for breaches of fiduciary duties to ERISA plans, this Court's review of the Section 502(a)(2) issue is warranted.[2]

B. The Question About The Scope Of Section 502(a)(3) Also Warrants This Court's Review

The Court should also grant review of the second issue presented by the petition for a writ of certiorari—whether a suit against a fiduciary to recover losses caused by a breach of fiduciary duty seeks "equitable relief" and is therefore authorized by Section 502(a)(3) of ERISA.

1. The court of appeals erred in holding that Section 502(a)(3) does not permit a suit against a fiduciary to recover losses caused by a breach of fiduciary duty. Contrary to the conclusion of the court of appeals, such a suit seeks "equitable relief" as authorized by Section 502(a)(3).

In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), this Court held that the "equitable relief" authorized by Section 502(a)(3) is relief that was "typically available in equity." *Id.*

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[2] This case is an appropriate one in which to address the issue even though the court of appeals suggested that petitioner may have forfeited reliance on Section 502(a)(2) by failing to invoke that specific provision in the district court. See Pet. App. 5a. Despite the court of appeals' statement about "waiver," *ibid.*, the court went on to address and to resolve the Section 502(a)(2) issue. That issue is therefore properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Moreover, it is unclear that the court of appeals actually *held* that petitioner had forfeited reliance on Section 502(a)(2). Respondents do not argue that the court did so, but state only that the court "suggest[ed] th[e] claim may have been waived." Br. in Opp. 5. Nor do respondents argue that the court's statement about "waiver" is a reason to deny the petition. See, *e.g.*, *id.* at 1-2 (summarizing reasons to deny the petition and not mentioning forfeiture or waiver). Thus, the court of appeals' passing reference to "waiver" should not dissuade this Court from granting review of the court of appeals' ruling on the Section 502(a)(2) issue.

at 256 (emphasis removed). Applying that standard, the Court concluded that Section 502(a)(3) does not permit a suit against a *non*-fiduciary to recover money damages. See *id.* at 256-263. The Court provided further elaboration on the scope of Section 502(a)(3) in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). In *Great-West*, the Court held that Section 502(a)(3) does not authorize an ERISA plan to sue to enforce a plan provision requiring beneficiaries to reimburse the plan for medical benefits for which they received a recovery from third parties. See *id.* at 206, 221. In reaching that holding, the Court rejected the plan's argument that restitution is necessarily "equitable relief." See *id.* at 212-218. The Court explained that, in the days of the divided bench, restitution was available at both law and equity, and, therefore, "whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 213 (citation omitted; brackets in original). Most recently, in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006), the Court held that a suit to enforce a plan reimbursement provision could be brought under Section 502(a)(3), because the plan beneficiary had agreed to preserve a portion of the funds received from the third party in a segregated investment account until resolution of the plan's claim against the funds. The Court concluded that both the plan's claim and the relief it sought would have been considered equitable in the days of the divided bench because the plan sought to enforce "an equitable lien established by agreement." *Id.* at 1877; see *id.* at 1873-1877.

Here, as in *Sereboff*, both petitioner's claim, breach of fiduciary duty, and the relief he seeks, surcharge of the trustee for the losses resulting from the breach, were typically—indeed, exclusively—equitable in the days of the divided bench. Historically, equity exercised exclusive jurisdic-

tion over claims by a trust beneficiary against a trustee for breach of trust, subject to limited exceptions not relevant here. See Restatement (Second) of Trusts (Second Restatement) § 197, at 433 (1959); *id.* § 198, at 434 (exceptions); John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 151, at 206 (5th ed. 1941); *Duvall* v. *Craig*, 17 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, suable only in equity."); *Manhattan Bank* v. *Walker*, 130 U.S. 267, 271 (1889); *Clews* v. *Jamieson*, 182 U.S. 461, 479 (1901).

In an action for breach of trust, equity provided a variety of remedies, including compelling the trustee to perform his duties, enjoining the trustee from committing a breach of trust, and "compel[ling] the trustee to redress a breach." Second Restatement § 199, at 437; see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* (Scott) § 199, at 203-207 (4th ed. 1988). One of the remedies, available when the breach had caused a loss to the trust, was a "surcharge" on the trustee in "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992); see 3 Scott § 205, at 238-240 (describing circumstances under which trustee was subject to "surcharge"); *Manhattan Bank*, 130 U.S. at 271 ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust.").[3] Thus, a suit against a fidu-

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[3] See, *e.g.*, *United States* v. *Mason*, 412 U.S. 391, 398 (1973) (holding that United States was not subject to "surcharge" for paying state tax on property held in trust for Indians because it acted with requisite care (quoting 2 Scott § 176, at 1419 (3d ed. 1967))); *Mosser* v. *Darrow*, 341 U.S. 267, 270, 272, 273 (1951) (holding that district court properly imposed a "surcharge" on bankruptcy trustee); *Princess Lida* v. *Thompson*, 305 U.S. 456, 458, 464 (1939) (describing authority of Pennsylvania state court, in a "suit in equity," "to surcharge [a trustee] with losses incurred").

ciary to recover losses caused by a breach of fiduciary duty seeks "equitable relief" under Section 502(a)(3).

Contrary to the court of appeals' conclusion (Pet. App. 10a-13a), neither *Mertens* nor *Great-West* indicates that Section 502(a)(3) does not authorize a suit against a fiduciary to surcharge the fiduciary for losses caused by a breach of fiduciary duty. *Mertens* involved a suit not against fiduciaries, but against *non*-fiduciaries. See 508 U.S. at 253-254, 262. Moreover, the plaintiffs in *Mertens* "d[id] not * * * seek a remedy traditionally viewed as 'equitable.'" *Id.* at 255. Rather, they sought "all damages according to proof" and "punitive damages." J.A. at 17, *Mertens*, *supra* (No. 91-1671). Likewise, *Great-West* involved neither a suit against a fiduciary nor a suit to obtain the equitable remedy of surcharge. Instead, *Great-West* involved a suit by a plan against a participant, which the plan characterized as a suit for restitution but the Court concluded was a suit for money damages under a contract. See 534 U.S. at 212-218.

2. The court of appeals' holding on the scope of Section 502(a)(3) warrants this Court's review because it deepens an existing conflict among the courts of appeals. The majority of the courts of appeals that have addressed the issue have, like the court below, held that Section 502(a)(3) does not authorize suits against a fiduciary to recover losses caused by a breach of fiduciary duty. See *Coan* v. *Kaufman*, 457 F.3d 250, 262-264 (2d Cir. 2006) (reversing prior holding in *Strom* v. *Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999)); *Calhoon* v. *TWA*, 400 F.3d 593, 596-598 (8th Cir. 2005); *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401, 405-409 (10th Cir. 2004), cert. denied, 126 S. Ct. 333 (2005); *Helfrich* v. *PNC Bank., Ky., Inc.*, 267 F.3d 477, 481-482 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002); see also *Goeres* v. *Charles Schwab & Co.*, No. 05-15282, 2007 WL 495191 (9th Cir. Feb. 14, 2007), petition for cert. pending, No. 06-1521 (filed May 15, 2007). In

contrast, the Seventh Circuit has held that Section 502(a)(3) does authorize such suits because monetary relief, "when sought as a remedy for breach of fiduciary duty[,] * * * is properly regarded as an equitable remedy." *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (2000) (citation omitted; brackets in original).[4]

Respondents incorrectly argue that "*Great-West* effectively eliminated any conflict over this issue." Br. in Opp. 12. As discussed above, nothing in *Great-West* is inconsistent with the conclusion that Section 502(a)(3) authorizes suits against a fiduciary to recover losses caused by a breach of fiduciary duty. Moreover, in a decision that post-dates *Great-West*, the Seventh Circuit expressly noted that "ERISA 'as currently written and interpreted, may allo[w] at least some forms of "make-whole" relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench,'" *McDonald* v. *Household Int'l, Inc.*, 425 F.3d 424, 430 (7th Cir. 2005) (quoting *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring)), and the court of appeals remanded to allow the plaintiffs to amend their complaint to add ERISA claims.

3. This Court's review of the Section 502(a)(3) issue is also warranted because the issue is of substantial importance. First, the confusion about whether a suit against a fiduciary to recover losses for a breach of duty is equitable relief authorized by Section 502(a)(3) is generating additional confusion in related areas of the law. Until recently, all the courts of

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[4] Although the Seventh Circuit denominated the remedy in that case "restitution," it approved an award of the benefits that the participant would have received but for the breach, which is the type of relief that would have been provided by surcharge. See *Bowerman*, 226 F.3d at 592. Moreover, the court clearly rested its conclusion on the fact that actions and remedies against a fiduciary for breach of fiduciary duty have traditionally been viewed as equitable. See *ibid.* (citing *Strom*, 202 F.3d at 144-145).

appeals that have considered an action for monetary relief against a breaching fiduciary under either Section 502(a)(2) or Section 502(a)(3) of ERISA have concluded that there is no right to a jury trial because the claims are equitable. See, *e.g.*, *Phelps* v. *C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323-1324 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); accord *Broadnax Mills, Inc.* v. *Blue Cross & Blue Shield*, 876 F. Supp. 809, 816 (E.D. Va. 1995). The Second Circuit, however, has recently read this Court's decision in *Great-West* to require a jury trial in a non-ERISA case in which shareholders sought monetary losses from corporate fiduciaries accused of breaching their duties. See *Pereira* v. *Farace*, 413 F.3d 330, 339-341 (2005), cert. denied, 126 S. Ct. 2286 (2006). As the concurrence in *Pereira* pointed out, that conclusion is "at odds with centuries of equitable proceedings involving claims against trustees, estate executors, and other fiduciaries." *Id.* at 344 (Newman, J., concurring). Against the weight of that authority, but consistent with *Pereira*, district courts have begun to rely on *Great-West* to conclude that ERISA participants who seek to recover plan losses under ERISA Section 502(a)(2) from breaching fiduciaries are entitled to a jury trial because they are seeking "legal" rather than "equitable" relief. See, *e.g.*, *Bona* v. *Barasch*, No. 01 Civ. 2289, 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003). This Court's review of the Section 502(a)(3) issue would help correct the confusion that has spread to the jury trial issue in the lower courts.

In addition, the Section 502(a)(3) issue is of considerable importance in its own right. Numerous judges, including Justices of this Court, have recognized that the existing confusion about the scope of Section 502(a)(3), coupled with ERISA's expansive preemption provision, has created "an unjust and increasingly tangled ERISA regime." *Davila*, 542 U.S. at 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (quot-

ing *DiFelice* v. *Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J. concurring)); see *Cicio* v. *Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting), vacated, 542 U.S. 933 (2004); *Tullis*, 464 F. Supp. 2d at 730. See also *Davila*, 542 U.S. at 221 n.7 (declining to address United States' argument concerning scope of Section 502(a)(3) because respondents had not pressed an ERISA claim). In those circuits that have precluded a surcharge remedy against ERISA fiduciaries, many plan participants and beneficiaries may be deprived of pecuniary redress from fiduciaries that have committed serious violations of ERISA's provisions and directly injured those they are charged with protecting. A wide range of injuries for which many courts previously granted monetary relief under Section 502(a)(3) are likely to go unredressed. See, *e.g.*, *Griggs* v. *E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 385 (4th Cir. 2001) (allowing relief where employer erroneously informed participant that his lump sum early retirement payout would be tax deferred); *Strom*, 202 F.3d at 144 (authorizing recovery of life insurance proceeds that were lost because of fiduciary's negligent handling of insurance application); *McFadden* v. *R&R Engine & Mach. Co.*, 102 F. Supp. 2d 458, 471-475 (N.D. Ohio 2000) (permitting cancer patient to recover health expenses after he lost coverage because fiduciary failed to submit premiums to insurance company). The gap in redress for fiduciary breaches is even greater when the court of appeals' holding on the Section 502(a)(3) issue is combined with its holding that many participants in defined contribution plans also cannot recover for losses to their plans under Section 502(a)(2). And there may be benefits to the Court in addressing in a single case both avenues for relief that may be available to an individual in petitioner's position.

As this Court noted in *Russell*, "the crucible of congressional concern" that motivated enactment of ERISA "was misuse

and mismanagement of plan assets by plan administrators," and "ERISA was designed to prevent these abuses in the future." 473 U.S. at 141 n.8. Indeed, Congress stated in the statute itself that ERISA's goal is "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Given that explicit statement of purpose, it makes little sense that plans and their participants should be left with *no* relief when plan assets are lost through fiduciary mismanagement. The United States therefore urges the Court to grant review of both issues presented in order to clarify that ERISA provides monetary remedies to recompense plans and participants who have been harmed by fiduciary breaches.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.;
DEWOLFF, BOBERG & ASSOCIATES, INC. EMPLOYEES'
SAVINGS PLAN, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF SEVEN LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae, Roger M. Baron, John Bronsteen, Michael Evans, Frank Partnoy, Radha A. Pathak, Marcy E. Peek, and Sandra L. Rierson (hereinafter "*amici*") respectfully submit this brief in support of petitioner, James LaRue, encouraging the grant of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, because that judgment is inconsistent with the language and intent of the ERISA statute, with this Court's precedent, and with sound public policy.[1]

Amici are law professors at seven law schools throughout the United States who teach and write about various subjects (*e.g.*, ERISA remedies,[2] class action litigation,[3] financial market regulation[4]) that relate to the core question presented by this case: whether 29 U.S.C. §§ 1132(a) and 1109, Sections 502(a)(2) and 409 of ERISA respectively, permit a participant in an individual account (*e.g.*, 401(k)) plan to bring a lawsuit to recover losses to his individual plan

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[1] This brief is submitted pursuant to the general consent of the parties to the filing of *amicus* briefs. Counsel of record for the petitioner has filed his consent with the Court on January 16, 2007. Counsel of record for the respondents has indicated that his consent will also be filed. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored, in whole or in part, by counsel for any party and that no party other than *amici* has made a monetary contribution to the preparation or submission of this brief. The names of the educational institutions are provided for identification purposes only.

[2] *See e.g.*, Roger Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: Its Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595 (2004).

[3] *See e.g.* John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. Illinois L. Rev. 903 (2005).

[4] *See e.g.*, Frank Partnoy, *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets* (2d rep. ed. 2004).

account caused by the plan fiduciary's misuse or mismanagement of funds.[5]

The provisions of ERISA at issue in this case were enacted to protect the American worker against the misuse or mismanagement of retirement funds by plan fiduciaries. The Fourth Circuit's interpretation of these remedial provisions affords breaching fiduciaries with safe harbor from punishment for misconduct that results in financial losses to the plans they manage. *Amici* believe that the Fourth Circuit's misinterpretation of the ERISA statute has high societal costs, and is contrary to the congressional purpose in enacting ERISA. *See e.g.*, Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. Mich. J.L. Reform 469, 539 (2002) ("[t]he long-term policy consequences of [such an interpretation of the ERISA civil remedies statute] is likely to

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[5] This question is referred to in the Petition for a Writ of Certiorari (the "Petition") as the "502(a)(2) Question" and will be referred to as such herein. The Petition also presents a second question regarding the proper interpretation of 29 U.S.C. § 1132(a)(3), Section 502(a)(3), of ERISA. This question is referred to in the Petition as the "502(a)(3) Question" and will be referred to as such herein. *Amici* agree with petitioner that the 502(a)(3) Question is also worthy of this Court's review. That said, this Court need only reach the 502(a)(3) Question if it grants the Petition and affirms the Fourth Circuit's interpretation of Section 502(a)(2). Because *amici* agree with petitioner and the United States that the Fourth Circuit has incorrectly interpreted 502(a)(2), *amici* have chosen to restrict the scope of this brief to the 502(a)(2) Question. If the Court grants the Petition, however, *amici* urge the Court to grant review on *both* questions presented so that the Court can reach the 502(a)(3) Question should it disagree with the interpretation of Sections 502(a)(2) and 409 advanced by petitioner, the United States, and *amici*.

Should the Court reach the 502(a)(3) Question, *amici* are in agreement with the government that the make-whole relief against a breaching fiduciary at issue in this case was typically available in historical equity courts as the remedy of "surcharge."

be a significant undermining of the effectiveness of 401(k) plans in providing retirement income security.").

This case is particularly significant because, as the government points out, the Fourth Circuit's holding on the 502(a)(2) and 502(a)(3) Questions, coupled with ERISA's broad preemption of state law,[6] leaves the workforce without any adequate remedy to right a fiduciary's neglectful, or otherwise manipulative, practices. *See* Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of Petition for Rehearing *En Banc* in *LaRue v. DeWolff, Boberg & Associates, Inc. et. al.*, (No. 05-1756), 2006 WL 2050799 (July 12, 2006) (hereinafter "US. LaRue Brief") at 1-3.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Cramped View of What Constitutes a Loss to an Individual Account Plan is Inconsistent with the Text and Intent of ERISA and this Court's Precedent.

ERISA was enacted to protect the interests of employees and their beneficiaries through a system of comprehensive federal requirements and safeguards. *See* Ellen A. Fredel, *ERISA and Managed Care: What the Courts Are Saying,* Benefits Law Journal, Vol. 8, No. 3, pp. 105 (1995). Congress took such action, "[a]fter several highly visible pension plan failures and abuses in the 1960s and 1970s." United States General Accounting Office, *Report to Congressional Requesters, Employer-Based Managed Care Plans, EIRSA's Effect on Remedies for Benefit Denials and Medical Malpractice,* p. 4 (July 1998) available at http://www.gao.gov/archive/1998/he98154.pdf (last visited January 17, 2007).

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[6] *See e.g., Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41 (1987).

At the center of this case are two particular provisions of ERISA - Sections 502(a)(2) and 409. Section 502(a)(2) of ERISA allows an action to be brought by the Secretary of Labor (the "Secretary"), plan participants, beneficiaries, or fiduciaries for "appropriate relief under [§ 409]." Section 409(a), in turn, dictates that,

> [a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this [title], shall be personally liable to make good to such plan *any losses to such plan* resulting from each such breach.

29 U.S.C. § 1109(a) (emphasis supplied).

In this case, the Fourth Circuit was forced to confront the question of whether the diminution in value of one participant's interest in an individual account plan constitutes a "loss[] to [the] plan" for purposes of Sections 502(a)(2) and 409. As explained *infra*, the Fourth Circuit's conclusion that such diminution does not constitute a plan loss is inconsistent with the text and intent of ERISA and is based on a fundamental misunderstanding of this Court's decision in *Massachusetts Mut. Life Ins. Co v. Russell*, 473 U.S. 134 (1985).

A. The Fourth Circuit's rule is inconsistent with the plain text of ERISA, which permits the recovery of "any losses to [the] plan."

As indicated above, Section 502(a)(2) of ERISA authorizes an action for appropriate relief while Section 409 provides make-whole relief for any losses to a plan resulting from fiduciary breaches. *See* 29 U.S.C. § 1109(a). Any analysis, therefore, of whether the diminution in value of a

participant's interest in his retirement plan constitutes a "plan loss" must begin with an understanding of the nature and structure of the particular type of plan at issue.

This case involves what is known as a defined contribution plan (also known as an individual account plan).[7] In such a plan, each individual account holder is a beneficiary, and the assets in each participant's individual account collectively comprise the *corpus* of a trust. *See* 29 U.S.C. § 1103(a); *see also* 26 U.S.C. § 401(a); I.R.S., *Qualifications; Participants Rights to Exercise Control of Assets*, Rev. Rul. 89-52, 1981-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989) (all assets in each individual account are assets of the plan itself); Dan M. McGill et. al., *Fundamentals of Private Pensions* 247 (7th ed. 1996) ("the sum of all of the account balances . . . equals the total market value of the plan's assets."). This legal ownership of assets by the plan manifests itself in several substantive and procedural ways. For example, plan investing is done in a unitary fashion, and the assets of each individual account are available to satisfy the operating costs and expenses of the entire plan.[8]

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[7] As defined by ERISA, the term "individual account plan," or "defined contribution plan," refers to:

> a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1102(34).

[8] *See* 1 Michael J. Canan, *Qualified Retirement Plans*, 3.1 (Practitioner ed. 1999) (although "employer contributions [are] credited to separate accounts for each employee, the trustee invests all of the funds in one certificate of deposit."); David A. Littell et. al., *Retirement Savings*

In this case, petitioner requested that losses to his interest in an individual account plan be restored to the plan by the breaching fiduciary. *See* Pet. at 8; Pet. App. at 21A.[9] The Fourth Circuit's holding, that the requested relief did not constitute a "loss to [the] plan," is based on a fundamental misunderstanding of the inherent structure of an individual account plan. In such a plan, a loss to any individual account constitutes a loss to the plan because the monies in the individual account are nothing less than the very *res* of the trust itself. *See* Dana Muir, *ERISA and Investment Issues*, 65 Ohio St. L.J. 199, 235 (2004) ("[i]n [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts"). Stripped to its essence, the Fourth Circuit's position is that a loss to a unit which is part of a whole does not constitute a loss to the whole itself.

In its initial opinion, published at 450 F.3d 570, the Fourth Circuit acknowledged that, "the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan." Pet. App. at 6a (emphasis in original). The court, however, provided absolutely no explanation of why such a view is "narrow" or why its alternative reading of the statute is even possible. Instead, the court rejected petitioner's statutory interpretation, without reference to citation or further

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Plans: Design, Regulation, and Administration of Cash or Deferred Arrangement 6 (1993) ("contributions are made to a single funding vehicle, usually a trust . . . as amounts are contributed to the trust, they are allocated to the participant's account.").

[9] Citations to the Petition are cited herein as "Pet. at__" whereas citations to material contained in the appendix to the Petition are cited herein as "Pet. App. at__."

explanation, by merely offering the unsupported assertion that petitioner's position, "finds no license in the statutory text and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief." Pet. App. at 6a.

After the initial Fourth Circuit opinion was published, the United States filed a brief *amicus curiae* supporting rehearing or rehearing *en banc* in which it cogently explained the error of the position adopted by the Fourth Circuit panel. *See generally* U.S. LaRue Brief at 2-14. In a published order, 458 F.3d 359, specifically dedicated to responding to the government's brief, the Fourth Circuit denied rehearing and rehearing *en banc* while continuing its adherence to an incorrect interpretation of 502(a)(2) and 409. The court stated that:

> Neither the text of Section 502(a)(2) nor Supreme Court precedent contemplate a remedy for individual, rather than plan, losses. . . If Congress meant to authorize individual damages claims under § 502(a)(2), it had only to say so.

Pet. App. at 24a. These statements beg - rather than answer - the fundamental question presented by this case (*i.e.*, whether the diminution in value of an individual's interest in a defined contribution plan constitutes a "plan" loss).

Compounding the court's failure to properly analyze the critical question is its complete misapprehension of the position advanced by the United States. For example, the court pronounced:

> LaRue involves a single plaintiff who sought to recover for an individual loss; indeed, LaRue did not even allege a "loss to the plan,"

> but only to his "interest in the plan..." [t]o adopt the Secretary's view, however, would necessarily transform every purely individual claim for breach of fiduciary duty into a "plan loss..." [t]he Secretary's view – that a purely individual claim that bears any legal relationship to a plan inures to the benefit of that plan – is contrary to the plain text of the statute.

Pet. App. at 24a (internal citations omitted).

Contrary to these conclusions, *amici* point out that the position of the United States is *not* that any individual claim for breach of fiduciary duty seeks to remediate a plan loss. Rather, the position of the United States is that the diminution in value of the interest of an individual account holder in a defined contribution plan is, by definition, a loss to the plan and, therefore, remediable under 502(a)(2). The Fourth Circuit's contrary view creates judicial burden, requiring courts to decide what constitutes a plan loss on an *ad hoc* basis without any principled way of differentiating the circumstances of given cases. *Amici* contend that the United States' position is the most sensible interpretation of the statutory language because it is reflective of the proper definition of an individual account plan. *See* Medill, 34 U. of Mich. J.L. Reform at 538-39 ("The better judicial interpretation . . . is to view the relief as flowing to the plan in accord with [S]ection 502(a)(2), so long as the monetary award is initially allocated to each participant's plan account rather than to his personal pocketbook.").[10]

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[10] A simple reality reinforces this point. Should petitioner be successful in his claim to, "have the plan properly reflect that which would be his interest in the plan but for the breach of fiduciary duty," Pet. App. 21a (quoting petitioner's briefing before the district court), there is no set monetary amount that petitioner will be guaranteed to recover. The nature of the plan structure dictates that legitimate plan expenses and

B. The Fourth Circuit's interpretation of 502(a)(2) and 409 is based on a misreading of this Court's decision in *Russell*.

Amici submit that the Fourth Circuit's rejection of the interpretation advanced by the United States was, in reality, motivated by the court of appeal's mistaken belief that, "[t]he Secretary's view is [] inconsistent with the Supreme Court's decision in *Russell* [because] the *Russell* Court held that 502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole, not on their own behalf." Pet. App. at 25a (citing *Russell*, 473 U.S. at 140).

Russell did distinguish between individual relief and relief that, "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. However, nothing in the *Russell* opinion can possibly be read to support the definition of "the plan as a whole" that has been adopted by the Fourth Circuit in the context of individual account plans. The plaintiff in *Russell* did not seek the recovery of a monetary loss caused by fiduciary breach. Instead, she sought compensation for emotional distress as well as punitive damages. In characterizing such relief as "individual," as opposed to for the benefit of "the plan as a whole," the *Russell* Court emphasized that, "the crucible of congressional concern was a misuse and mismanagement of plan assets by plan administrators." *Russell*, 473 U.S. at 140 n.8.[11] The Fourth Circuit's misapplication of one phrase in *Russell* to the very

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costs may first need to be satisfied from the balance of individual accounts on a *pro rata* basis prior to any distributions.

[11] This Court has consistently reiterated that, "[s]pecial congressional concern" has focused on preserving the integrity of plan asset management. *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).

different context of individual account plans turns the reasoning of *Russell* on its head.

II. This Court Should Clarify What Constitutes a Loss to an Individual Account Plan for Purposes of 502(a)(2).

In the more than twenty years since this Court last interpreted Section 502(a)(2), individual account plans have become the primary vehicle for private retirement savings. At the time of *Russell*, the world of such individual retirement accounts was in its infancy. Today, they are the norm. It is estimated that defined contribution plans hold approximately $2.9 trillion in assets across the country. *See* Board of Governors of the Federal Reserve System, *Flow of Fund Accounts to the United States, Flows and Outstandings, First Quarter 2006*, Statistical Release Z.1, at 113 (June 8, 2006). Surveys indicate that over 80% of the country's employees participate in 401(k) plans. *See* Profit Sharing 401/k Council of America, *47th Annual Survey of Profit Sharing and 401(k) Plans: Overview of Survey Results* available at http://www.psca.org/DATA/47th.html (last visited on January 17, 2007).

Plan fiduciaries are obligated to follow standards of duty, loyalty, and care that are "the highest known to the law." *Donovan v. Bierwith*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). With the advent of individual account plans, fiduciary obligations related to plan management are manifested through conduct toward the individual account holders comprising the plan. Sound management obligations are owed to each plan beneficiary and proceed from a fiduciary's position of trust. *See* 29 U.S.C. § 1104(a). Contrary to the court of appeal's understanding, the nature of an individual account plan's structure is such that a breach of a fiduciary duty owed to an individual account is a breach of the duty owed to the plan. Demonstrating a breach of, "any of the responsibilities, obligations, or duties" is sufficient to

establish recovery for "any losses." 29 U.S.C. § 1109(a). *Amici* believe that this Court should therefore square the teachings of *Russell* concerning plan losses, and fiduciary duties, with the current environment of retirement savings.

A. Because the confusion in the lower courts concerning the proper definition of a plan loss is based on differing views of *Russell*, only clarification by this Court can achieve uniformity on this important issue.

Amici agree with petitioner and the United States that the Fourth Circuit decision in this case has re-engendered a circuit split regarding the proper application of Section 502(a)(2). Pet. at 16-19; U.S. LaRue Brief at 11-14. A well-recognized circuit split first developed when the Fifth Circuit issued its opinion in *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338 (5th Cir. 2005). *Milofsky* held that a small subset of 401(k) plan participants lacked standing to sue under Section 502(a)(2) because they sought losses to be allocated to their individual accounts stemming from a delay in the transfer of their assets from a prior plan - breaches that were not, in the panel's view, "targeted [at] the plan as a whole." *Id.* at 343-44, n.16. However, at the urging of the United States,[12] the Fifth Circuit agreed to rehear the *Milofsky* case *en banc*, 442 F.3d 311 (5th Cir. 2006), and vacated the panel decision - temporarily eliminating the circuit split.

Given the importance and recurring nature of the question, as well as continued division among the district

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[12] Supplemental Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant Requesting Rehearing and Rehearing *En Banc* of the Fourth Circuit Panel Opinion in *Milofsky, et. al., v. American Airlines, Inc., et. al.*, (No. 03-11087) (August 11, 2005) available at https://www.dol.gov/sol/media/briefs/milofsky(A)-8-11-05.pdf (last visited January 17, 2007).

courts,[13] it was well recognized that the *Milofsky en banc* decision far from resolved the 502(a)(2) Question. In the words of one commentary:

> Even when [the *Milofsky*] decision was automatically vacated by grant of rehearing *en banc*, hope remained that we would see a badly split decision that would inexorably reach the Supreme Court. . . The (a)(2) issue that briefly made *Milofsky* a household name. . . is going to resurface, if only because a large number of defendants in stock drop cases are continuing to raise the issue. Sooner or later, there will be a circuit court decision that actually discusses the issue, and, when it does, we'll be waiting.

Robert N. Eccles & David E. Gordon, *Old Whines, New Battles*, ERISA Litigation Reporter, Vol. 14 No. 2, pp. 1-3 (March-April 2006). The wait for such a case is over. The Fourth Circuit's decision has once again ignited the circuit division and provided the analysis that commentators hoped would be addressed by this Court.

The Fourth Circuit, in its order denying rehearing and rehearing *en banc*, challenges the suggestion by the United States that the decision in this case, "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits." Pet. App. at 26a. According to the Fourth Circuit, there is no circuit split because the decisions cited by the United States all, "involved a subset of plan beneficiaries or participants that alleged plan losses" as opposed to, "an individual plaintiff." *Id.* This distinction misses the point. As the

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[13] *Compare In Re Marsh ERISA Litigation*, 2006 WL 3706169, at * 6-7 (S.D.N.Y. Dec. 14, 2006) *with Fisher v. J.P. Morgan Chase & Co.*, 2006 WL 2819606, at * 4 (S.D.N.Y. Sept. 29, 2006).

United States has explained, U.S. LaRue Brief at 13-14, the *reasoning* employed by these other courts of appeals would directly foreclose the position adopted by the Fourth Circuit in this case. *See e.g., In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 232 (3d Cir. 2005) ("the fact that the assets at issue were held for ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan."). In fact, such courts have specifically declined to limit such responsibility to only, "'loses that will ultimately redound to the benefit of all participants.'" *Id.* (citations omitted).

In any event, *amici* respectfully suggest that the 502(a)(2) Question warrants immediate review by this Court irrespective of whether or not the confusion in the lower courts rises to level of a square circuit split. As explained by petitioner and the United States, the question is of exceptional importance. *See generally* Pet. at 10-12; U.S. LaRue Brief at 4-11. Moreover, the Fourth Circuit has explicitly rejected the position of the very government agency charged with enforcement of the ERISA statute. *See* 29 U.S.C. §§ 1132, 1135 (noting that the Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA). Finally, and most importantly, the confusion in the lower courts is entirely based on differing interpretations of this Court's two decade plus old *Russell* decision. *See e.g., Rogers, et. al. v. Baxter International, Inc.*, 417 F.Supp.2d 974, 981 (N.D. Ill. 2006) (noting that, "[c]ourts are currently in disagreement over the proper interpretation of 502(a)(2)" largely because of the, "gloss on [S]ections 502(a)(2) and 409(a)" offered by the Supreme Court in its 1985 *Russell* decision). The words of Chief Judge King, dissenting in the original *Milofsky* panel opinion, are particularly instructive in understanding how *Russell* has been misapplied. The dissenting opinion observed:

> *Russell* never reached the conclusion that the [*Milofsky* panel] majority reaches *i.e.*, that

> standing can exist under [Section] 502(a)(2) only if *all* plan participants would benefit from the litigation...The [panel] majority correctly notes that *Russell* distinguishes between relief for individuals and relief for the plan as a whole...*Russell* does not, however, stand for the proposition that the plan as a whole is synonymous with all participants of the plan, and several courts have rejected this definition of the plan as a whole.

Milofsky, 404 F.3d at 349 n.4 (King, C.J., dissenting) (emphasis in original) (citations omitted; internal quotation marks omitted).

B. This case is an ideal vehicle to resolve what constitutes a loss to an individual account plan for purposes of 502(a)(2).

This case presents an excellent opportunity for the Court to resolve the recurring question of what constitutes a loss to an individual account plan for purposes of Sections 502(a)(2) and 409.

First, the question was squarely presented to the court of appeals. As the Fourth Circuit noted in its initial opinion, "[petitioner] first suggests that remuneration of his plan accounts finds express authorization in the text of 29 U.S.C. § 1132(a)(2)." Pet. App. at 5a.

Second, the court of appeals expressly passed on the question – rejecting the interpretation urged by petitioner and the United States and holding "Section 1132(a)(2) provides remedies only for entire plans, not for individuals." Pet. App. at 2a.

Third, it is beyond dispute that this question was outcome determinative. The Fourth Circuit declined to rest its holding on an alternative fact-bound argument (*i.e.*, waiver) advanced by the respondents, instead resting its holding exclusively on its interpretation of Section 502(a)(2). In its brief *amicus curiae* supporting rehearing and rehearing *en banc*, the United States requested that:

> (1) if the [c]ourt concludes that [petitioner] in fact waived his argument under [S]ection 502(a)(2), it vacate that portion of the decision holding that [S]ection 502(a)(2) provides no remedy; or (2) if the [c]ourt concludes that [petitioner] sufficiently raised and preserved the [S]ection 502 (a)(2) argument, it reverse the order of the district court dismissing the claim and hold that [S]ection 502 (a)(2) provides a cause of action and a remedy in the circumstances in this case.

U.S. LaRue Brief at 4. Despite the government's request that the court of appeals reach the narrower waiver issue, the Fourth Circuit devoted its entire order denying rehearing and rehearing *en banc* to disputing the position articulated by the United States, holding that the interpretation advanced by the United States is contrary to the plain text of the statute, inconsistent with *Russell,* and would strip this Court's 502(a)(3) oriented decisions in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) of any real meaning. This resolution of the 502 (a)(2) Question is clearly now the settled law of the Fourth Circuit.

Finally, counsel for both parties in this case are knowledgeable and experienced regarding both ERISA and practice before this Court. Peter K. Stris, counsel of record for petitioner, argued two cases last Term before this Court,

including *Sereboff et ux. v. Mid Atlantic Medical Services Inc.*, 126 S.Ct. 1869 (2006) - an ERISA case involving the scope of Section 502. Shaun P. Martin, co-counsel for the petitioner, is a tenured law professor who served as co-counsel before this Court in *Sereboff*. Jean-Claude Andre, co-counsel for petitioner, recently argued *Jones v. Bock*, 126 S. Ct. 1462 (2006), and *Williams v. Overton* 126 S. Ct. 1463 (2006), before this Court and will be arguing *Winkelman v. Parma City School District*, 127 S. Ct. 467 (2006), later this Term. Robert Hoskins, co-counsel for the petitioner, is an experienced ERISA practitioner who has argued numerous ERISA related cases on appeal, published in the field, and lectured about ERISA litigation. Thomas Gies, counsel of record for respondents, is an experienced litigator at a major Washington, D.C. law firm, who has litigated numerous ERISA related cases and published a variety of ERISA related commentary, *see e.g.*, Thomas P. Gies, *ERISA Preemption Meets the Union Corporate Campaign: The Challenge to the Maryland "Wal-Mart Bill,"* ERISA Litigation Reporter, Vol. 14 No. 2, p. 3 (March-April 2006). He has also argued previously before this Court in *Jacksonville Bulk Terminals v. ILA*, 457 U.S. 702 (1982).

C. If the Court has any reservations, it should call for the views of the Solicitor General.

If the Court has any reservations about granting the petition, *amici* respectfully suggest that the Court call for the views of the Solicitor General. As noted in the Petition, the Secretary of Labor has continuously filed *amicus* briefs on both the 502(a)(2) Question and 502(a)(3) Question in courts of appeal across the country.[14] In each case the Secretary has advanced petitioner's positions.

---

[14] *See e.g.*, In the Fifth Circuit, Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant and Requesting

As explained by the United States in its brief filed with the Fourth Circuit below, the holding in this case will affect not only private litigants - but the United States as well. *See* U.S. LaRue Brief at 1. The Secretary has primary authority to interpret and enforce the provisions of Title I of ERISA. *See* 29 U.S.C. §§ 1132(a)(2), 1135. Because the government plays a prominent role in the enforcement of ERISA's provisions, and the statutory provisions construed in this case are the very tools by which the Secretary carries out this obligation, *amici* believe that the Solicitor General should be called upon to resolve any uncertainty regarding the propriety of further review.

Reversal of the District Court Decision in *Milofsky, et. al., v. American Airlines, Inc., et. al.*, (No. 03-11087) (February 27, 2004) available at http://www.dol.gov/sol/media/briefs/milofskv(A)-2-27-2004.htm (last visited January 17, 2007) (addressing the 502(a)(2) Question); In the Ninth Circuit, Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Requesting Reversal in *Gores v. Charles Schwab & Co., Inc., et. al.* (No. 05-15282) (July 11, 2005) available at http://www.dol.gov/sol/media/briefs/gores(A)-7-11-2005.pdf (last visited November 5, 2006) (addressing the 502(a)(3) Question).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL A. MONTUORI
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January 2007

62

(7)

No. 06-856

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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MOTION TO DISMISS THE WRIT

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29 U.S.C. § 1132(a)(2)	*passim*
29 U.S.C. § 1132(a)(3)	*passim*

IN THE

Supreme Court of the United States

No. 06-856

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Appeal from the United States Court of Appeals for the Fourth Circuit

---

MOTION TO DISMISS THE WRIT

INTRODUCTION

On November 6, 2006, Petitioner filed a Petition for a writ for *certiorari* asking the Court to decide whether a participant in a defined contribution plan may recover alleged lost profits in his individual plan account. Petition at 6. Petitioner claims such losses resulted from Respondents' failure to timely process his request to change his investment allocations in certain mutual funds available to plan participants. Petition at 5-6. In addition to raising the question litigated in the district court whether such relief is available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the Petition invoked

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), which was added to the case on motion for rehearing before the Fourth Circuit panel. The petition (as had the complaint) asserted that "Petitioner is a participant in the DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan," and that "Petitioner in this case is a participant in a 401(k) plan." Petition at 5, 8. The Solicitor General filed a brief recommending that the Court grant the petition, asserting that "Petitioner James LaRue is a participant in an ERISA-covered 401(k) pension plan." U.S. brief at 2. This Court then granted *certiorari* with regard to both questions.

In reviewing and assembling materials in preparation for briefing on the merits, Respondents discovered that on July 22, 2006, while the case was still pending before the Fourth Circuit, Petitioner withdrew all of his funds from his account in the Dewolff, Boberg & Associates, Inc., Employees' Savings Plan (the "Plan"). Petitioner thereby ceased to be a participant in the Plan. See Declaration of Morgan Buffington, Exh. A. Accordingly, at the time the Petition was filed, Petitioner was not then, and is not now, a participant in the Plan.

The newly discovered fact that Petitioner is no longer a participant in the Plan moots this case. *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238 (1985) *(per curiam)*. Petitioner's new status leaves him with no legally cognizable interest in the outcome of the case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (plaintiff below "lacked a still vital claim for prospective relief" as a result of voluntary decision to leave employment by the State of Arizona). Moreover, in order to decide the legal issues now presented by virtue of the Petitioner's new status as a former participant in the Plan, this Court would have to rule on issues on which it did not grant *certiorari*. For these reasons, the Petition should be dismissed.

ARGUMENT

I. PETITIONER'S ACTIONS RENDER HIS CLAIMS MOOT

As a result of Petitioner's withdrawal from the Plan, there is no actual case or controversy and the case is moot. A controversy ceases to exist when the issues presented are no longer "live," or when the parties no longer have a "legally cognizable interest in the outcome." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001). Neither of the two claims asserted in the Petition involve live controversies.

A. Petitioner's § 502(a)(2) claim is moot.

Petitioner's § 502(a)(2) claim is moot because, under the legal theory supporting this claim, there is no type of relief in which Petitioner would have any legally cognizable interest. Section 502(a)(2) provides that a civil action may be brought "by a participant, beneficiary, or fiduciary." Many lower courts have held that *former* plan participants may not bring suit under § 502(a)(2). *See, e.g., Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986) *(per curiam) cert. denied*, 479 U.S. 916 (1986); *Crawford v. Lamantia*, 34 F.3d 28 (1st Cir. 1994); *In re AEP ERISA Litigation*, 437 F.Supp. 2d 750 (S.D.Ohio 2006). Other courts have ruled that former participants can pursue a § 502(a)(2) claim for additional benefits under the terms of the plan. *See, e.g., Sommers Drug Stores, Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345 (5th Cir. 1989) (plaintiffs who had accepted lump sum payments still had "colorable claims for vested benefits"). Respondents are unaware of any authority holding that a former participant in a defined contribution plan can bring a claim under § 502(a)(2) to recover damages measured by lost profits following an alleged failure to process a request to change investments in an individual plan account. This Court has not addressed this issue.

Recoveries under § 502(a)(2) must "inure to the benefit of the plan as a whole." *Massachusetts Mutual Lift Ins. Co. v. Russell*, 473 U.S. 134 (1985). In the briefing on the Petition for writ of *certiorari*, Petitioner and the Solicitor General suggested that Petitioner's § 502(a)(2) claim satisfies *Russell* because, in seeking to recover lost profits caused by Respondents' alleged failure to timely follow his investment instructions, Petitioner was actually seeking relief under § 502(a)(2) in the form of "payment by respondents (i.e., the breaching fiduciaries) *to the plan*." Petition at 14 (emphasis in original). But because Petitioner is no longer a Plan participant, he has no personal stake in whether or not the Plan receives a benefit. Accordingly, Petitioner has no legally cognizable interest in this claim, which seeks to benefit only the Plan. Moreover, because Petitioner is no longer a Plan participant, he lacks "a still vital claim for prospective relief" under this theory. *Arizonans for Official English*, 520 U.S. at 67. Now that Petitioner is no longer a Plan participant, any recovery achieved by the Plan would not benefit the Petitioner, because it could only go to the Plan. Conversely, the only way the recovery sought under this theory would reach Petitioner is through a payment directly to Petitioner. Such a recovery, of course, would not go to the Plan.

B. Petitioner's § 502(a)(3) claim is also moot.

Petitioner's § 502(a)(3) claim likewise does not present a live controversy. Petitioner's decision to take a final distribution of his interest in the Plan means he is no longer a participant entitled to maintain a claim under this provision. *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100-01 (2d Cir. 2005) (in finding that plaintiff was no longer a participant when she filed the complaint and therefore could not maintain her § 502(a)(3) claim, the court stated, "The [Supreme Court] has also held that § 502(a)(3) strictly limits the 'universe of plaintiffs who may bring civil actions'" (*quoting*

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 247 (2000)).

In the district court, Petitioner argued explicitly that his § 502(a)(3) claim sought a recovery to his individual account in the Plan, rather than a payment of money damages to him, claiming that he did "not wish for the court to award him any money, but . . . simply wants the plan to properly reflect that which would be his interest in the plan." Petition App. 21a. Petitioner's newly discovered status as a former Plan participant moots the § 502(a)(3) claim for the same reasons the § 502(a)(2) claim no longer presents a live controversy. According to Petitioner's own theory, he has no legally cognizable interest in a recovery by the Plan, even if the recovery could be properly characterized (which it cannot) as appropriate equitable relief within the meaning of *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

This Court has recognized that when a petitioner voluntarily changes his status (for example, from participant to non-participant) while litigation is pending, that change may render the matter moot by eliminating the petitioner's legally cognizable interest in his claim. *See City News*, 531 U.S. 278, (dismissing claims as moot because petitioner, who had unsuccessfully applied for a license to operate an adult-oriented retail shop, voluntarily withdrew his application for the license after petitioning for review); *Karcher v. May*, 484 U.S. 72 (1987) (dismissing an appeal as moot when state legislators were not re-elected during the litigation); *Craig v. Boren*, 429 U.S. 190 (1976) (finding moot one plaintiff's challenge to an under-age drinking statute because that plaintiff came of age during the course of the litigation); *Bunting v. Mellen*, 541 U.S. 1019 (2004) (finding challenge to a school prayer policy moot, in part, because plaintiffs graduated, differentiating between plaintiff's graduation and a defendant's temporary cessation of challenged conduct).

Petitioner's conduct here—his voluntary withdrawal of his entire account balance in the Plan—has stripped him of the necessary status to bring a § 502(a)(3) claim as a participant. As in *City News*, it is the conduct of Petitioner, "not its adversary, whose conduct saps the controversy of vitality." 531 U.S. at 284 n.1.

II. THIS CASE NOW RAISES LEGAL ISSUES NOT PRESENTED TO THE COURT WHEN THE PETITION WAS FILED

Dismissal of the Petition is appropriate for the additional reason that Petitioner's changed status presents additional legal issues beyond the scope of the questions presented by the Petition.

As suggested above, the lower courts have reached arguably inconsistent outcomes with respect to the right of a former plan participant to maintain a claim for benefits under the terms of an ERISA plan. Many courts have held that a former plan participant cannot maintain such an action. But other courts, applying *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), have held that former plan participants may continue to maintain claims under both § 502(a)(2) and § 502(a)(3) seeking additional vested benefits under the terms of the plan. *See, e.g., Champagnie v. Kaufman*, 2007 WL 1613491 (D.Conn. June 1, 2007) (finding former employee could bring both § 502(a)(2) and § 502(a)(3) claims because she had "colorable claim for vested benefits"). Many of these cases take different approaches to "statutory standing," and do not address the mootness issue now presented in this case. *Compare Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986) (*per curiam*) (former employees lacked standing to pursue § 502(a)(2) claims because they had received lump sum payments and therefore they were not seeking vested benefits) *cert. denied*, 479 U.S. 916 (1986); *Crawford v. Lamantia*, 34 F.3d 28 (1st Cir. 1994) (terminated employee who filed his

initial complaint while he was a participant and then collected all vested benefits due to him under the plan could not pursue § 502(a)(2) claim as a result of the divestment); *Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628 (5th Cir. 1985) (retirees who accepted lump sum payments from their Plans did not have standing to bring ERISA claims) *cert. denied*, 474 U.S. 1006 (1985); *Loren v. Blue Cross and Blue Shield of Mich.*, 2006 WL 2228978 (E.D.Mich. Aug. 3, 2006) (actions of plaintiff who ceased to be a member of the plan after commencing litigation mooted her § 502(a)(2) and § 502(a)(3) claims), *with Harzewski v. Guidant Light*, -- F.3d --, 2007 WL 1598907 (7th Cir. June 5, 2007); *Amalgamated Clothing & Textile Workers Union AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988) (both finding that former employees had standing under ERISA to bring claims for benefits). *See also Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006).

It is, at a minimum, clear that the question whether Petitioner can continue to pursue his claims for damages measured by lost profits now that he is no longer a participant in the Plan was not presented in the Petition. Petitioner's change of status would thus seem to require the Court to decide a legal issue raised here for the first time. *See City News*, at 745 (dismissing as moot, in part, because "Full briefing and argument have revealed that the question City News tendered, and which we took up for review, is not now and never was accurately reflective of City News's grievance"). The new question whether the change in Petitioner's status precludes his theories, or gives rise to mootness, appears logically antecedent to the issues on which the Court granted *certiorari*. Therefore, this Court may wish to consider whether this new question should now be decided.

CONCLUSION

The writ of *certiorari* should be dismissed.

Respectfully submitted,

THOMAS P. GIES *
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1001 Pennsylvania Ave, NW
Washington, DC 20004
(202) 624-2500

* Counsel of Record

APPENDIX

BEST AVAILABLE COPY

No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE, *Petitioner*,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN, *Respondents*.

DECLARATION OF MORGAN BUFFINGTON

My name is Morgan Buffington. I have prepared this Declaration in support of Respondents' motion to dismiss the petition for *certiorari* filed in the above-referenced case. The facts and information contained herein are based on my personal knowledge and are true and correct to the best of my knowledge.

1. I am the Vice President of Finance & Administration for DeWolff, Boberg & Associates, Inc. ("DBA"). DBA is the plan sponsor of the Dewolff Boberg Employees' Savings Plan ("the Plan").
2. On Wednesday, July 11, 2007 I learned that, in July, 2006, Petitioner James LaRue elected to withdraw all of his funds from the Plan and ceased to be a participant in the Plan. I conveyed this information to our counsel later that same day.
3. A firm known as The Pension Service Inc. ("TPSI") is the third party administrator of the Plan. I requested the documents described in this declaration from TPSI to verify the accuracy of the facts described herein.

4. Mr. Larue completed and signed an "Election of Payment Method Form" on July 22, 2006, and selected the option to receive "ALL of my Plan distribution." (Ex. 1). That form was processed by TPSI within a few days. Once that happened, Mr. LaRue ceased being a participant in the Plan, an event which took place no later than July 27, 2006. (Ex. 1).
5. In October, 2006, Mr. LaRue received his last quarterly statement from TPSI. The statement shows a balance of $0.00 and a withdrawal of $119,009.13 during the third quarter of 2006. (Ex. 2). Mr. LaRue did not receive any subsequent quarterly statements from TPSI.
6. Mr. LaRue terminated his employment with DBA in 2001. Because he was no longer employed by DBA in July 2006 and received no other income from DBA, he could not make any additional contributions to the Plan following his decision to close out his account.
7. Mr. LaRue did not complete forms to take a hardship withdrawal or submit any documentation necessary to make a hardship withdrawal. Mr. LaRue did not withdraw his account balance as a loan.

• • • •

Pursuant to 28 U.S.C. Section 1746, I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct. Executed this 18th day of July, 2007, at Easley South Carolina.

Dated: July 18, 2007

Morgan Buffington

Morgan Buffington

2a

Pensions Administrative Services

3a

Participant Information

help

DEWOLFF-BOBERG & ASSOCIATES, INC., 743-[redacted]

JAMES LARUE, [redacted]

General | [redacted] | Allocation | Trans History | Trading Policies

Sort By: (•) Source then Fund ( ) Fund Only ( ) Fund then Source

As Of 07/10/2007:

Grand Total for Participant: $0.00

Source #	Source Code	Source Description

** Unit and unit values are rounded to six (6) decimal places. All accounting is actually calculated at eight (8) decimal places.

**** Your actual balance may be different if you are not fully vested.

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JULY 27, 2006

DEWOLFF-BOBBINS & ASSOCIATES, INC.
103 PROFESSIONAL BUILDING
HILTON HEAD ISLAND, SC 29928-1717

TPS PENSION SERVICE INC.
3688 HARLEM ROAD
SUITE 2B
CHEEKTOWAGA, NY 14215-3046

RE: Case: 743-[redacted]
Name: JAMES LANUM
SSN: XXX-XX-[redacted]

CONTRACT #: GAP-C4-HP44

Below is a tax confirmation of the recently processed WITHDRAWAL:

Tax Form Recipient Address	JAMES LANUM [redacted] SOUTHLAKE, TX 76092-6164
SSN	XXX-XX-[redacted]
State Tax Code	TX
Form Type	TOTAL
Distribution Code	1

Tax Gross	119,009.13
Federal Taxable	119,009.13
Federal Taxes Withheld	33,278.07
Additional Federal Taxes Withheld	0.00
TOTAL Federal Taxes Withheld	33,278.07
State Taxable	0.00
State Taxes Withheld	0.00
Additional State Taxes Withheld	0.00
TOTAL State Taxes Withheld	0.00
Outstanding Loan	47,381.32
Employee Contribution	0.00
Subject to Capital Gains	0.00

5a

5186309713 TPSI 01:30:07 p.m. 07-11-2007 3/4

JULY 27, 2006

DONOLFF-ROBERS & ASSOCIATES, INC.
102 PROFESSIONAL BUILDING
HILTON HEAD ISLAND, SC 29928-1717

THE PENSION SERVICE INC.
3468 ENGLISH ROAD
SUITE 23
CHEEKTOWAGA, NY 14215-3046

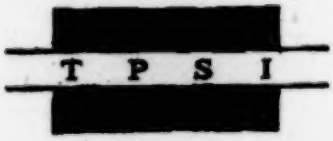
RE: Case: 743-[redacted]
Name: JAMES LANUS
SSN: XXX-XX-[redacted]

CONTRACT #: GAP-06-NY66

Below is a tax confirmation of the recently processed WITHDRAWAL:

Tax Form Recipient Address	JAMES LANUS [redacted] SOUTHLAKE, TX 76092-8164
SSN	XXX-XX-[redacted]
State Tax Code	TX
Form Type	TOTAL
Distribution Code	1L

Tax Gross	0.00
Federal Taxable	0.00
Federal Taxes Withheld	0.00
Additional Federal Taxes Withheld	0.00
TOTAL Federal Taxes Withheld	0.00
State Taxable	0.00
State Taxes Withheld	0.00
Additional State Taxes Withheld	0.00
TOTAL State Taxes Withheld	0.00
Outstanding Loan	47,381.22
Employee Contribution	0.00
Subject to Capital Gains	0.00



3685 Harlem Road, Suite 2B
Cheektowaga, NY 14215
Phone: (716) 839-9405
Fax: (716) 839-9713

DeWolf-Boberg Employees' Savings Plan

ELECTION OF PAYMENT METHOD FORM (Please Print Clearly)

PARTICIPANT NAME: Jessie Lollar DATE OF BIRTH: [redacted]

DATE OF HIRE: 10/82 DATE OF TERMINATION: 8/01 SSN: [redacted]

I understand that I have an outstanding loan balance and if I elect to withdraw my account balance and not pay the loan balance back, my outstanding loan balance will be defaulted and will become a taxable distribution (reportable as taxable income on a form 1099).

I hereby elect the following method(s) of payment for my distribution from the Plan:

( ) DIRECT ROLLOVER of (select one):
- ( ) ALL of my Plan distribution
- ( ) $ _____ of my Plan distribution ($500 or more)
- ( ) The portion of my Plan distribution not paid directly to me ($500 or more)

Name of Funding Company: _____

Your Account #: _____

Name of Plan (if applicable) and Address of IRA or Plan: _____

_____

I represent that the above-named eligible retirement Plan is an individual retirement account or individual annuity established in my name, or a qualified defined contribution retirement Plan or annuity Plan which accepts direct rollovers.

Chase Bank

(X) PAYMENT TO ME of (select one):
- (X) ALL of my Plan distribution wire to bank, acct # [redacted]
- ( ) $ _____ of my Plan distribution ABA Rtg. # [redacted]
- ( ) The portion of my Plan distribution not paid in a direct rollover

Chase Bank
4500 Calligan Blvd.
Ft Worth, TX 76034
817/427-5861

The requested distribution are in accordance with the terms and provisions of the Plan, and represent a total lump sum distribution of 100% of my account balance.

I acknowledge that all payments paid directly to me from the Plan are subject to the Mandatory 20% Federal withholding for Income Tax.

PARTICIPANT SIGNATURE

SPOUSAL SIGNATURE (if applicable)

[redacted], Ln 750 South Lake, TX 76092
STREET CITY, STATE, ZIP

7/23/06
DATE

7a

THE PENSION SERVICE INC.
3685 HARLEM ROAD
SUITE 2B
CHEEKTOWAGA , NY 14215-2046

SSN: XXX-XX[redacted]

JAMES LARUE
[redacted]
SOUTHLAKE TX 76092-6164

DEWOLFF-BOBERG & ASSOCIATES, INC.
743 - [redacted]

YOUR TOTAL ACCOUNT VALUE IS:
$0.00 AS OF 09/30/2006

YOUR RETIREMENT PORTFOLIO FROM 07/01/2006 TO 09/30/2006

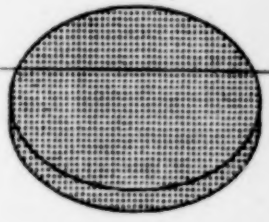
Opening Value on 07/01/2006	$118,670.24
Contributions	$0.00
Investment Gain/(Loss)	$338.89
Withdrawals	($119,009.13)
Total Account Value on 09/30/2006	$0.00

Stable Value Gartmore Money Mkt Fd Ic	0.00 %	$0.00	1.000000
Total Account Value	0 %	$0.00	

Due to rounding, Total Account Value percentage may not equal 100%. Your actual balance may be different if you are not yet fully vested with your employer. Please contact your employer for details.

Your Recent Retirement Account History*

*Corrections made after the close of past periods are not reflected in this representation.



Stable Value

00000427

YOUR CURRENT INVESTMENT PORTFOLIO BY FUND OPTION AND SOURCE

YOUR EMPLOYEE PRE-TAX DEFERRALS

Stable Value Gartmore Money Mkt Fd Ic	$118,679.24	$0.00	$0.00	($118,609.13)	$338.89	$0.00	$0.00	0.0000

COMMENTS

A review of the 401k Plan's investment choices was completed recently. As a result of this analysis, the following current funds will be replaced by the corresponding new funds effective 6/30/03:

CURRENT FUNDS	NEW FUNDS
Janus Worldwide	American Funds Euro Pacific Growth
Van Kampen Real Est.	AIM Real Estate Fund – A
Invesco Energy Fund	Prudential Natural Resources – A

No action is required on your part if you want to have your investment funds automatically replaced with the new funds. The new funds will also be changed within your deposit allocation so that new deposits will be allocated appropriately.

YOUR INVESTMENT PERFORMANCE SUMMARY FROM 07/01/2006 TO 09/30/2006

Your personal performance during this reporting period is 1.12 %.
This performance is for the period beginning 07/01/2006 and ending 09/30/2006. It is for your entire portfolio and takes into account your beginning balance, and the amount and timing of any deposits or withdrawals.

Your personal performance for this year-to-date is 3.00 %.
This performance is for the period beginning 01/01/2006 and ending 09/30/2006. It is for your entire portfolio and takes into account your beginning balance, and the amount and timing of any deposits or withdrawals.

Below is the past investment performance for each of the fund alternatives selected by your Plan Representative. Past performance may be of help for future planning. Please note that past performance is not a guarantee of future performance.

Performance as of 09/29/2006

	Actual		Annualized			Annualized	
+ Alm Real Estate Fund A	23.80 %	28.82 %	28.34 %	24.31 %	N/A	14.17 %	12/31/1998
+ Dreyfus Prem Tech Gr Fd A	0.88 %	6.17 %	6.32 %	6.06 %	N/A	7.42 %	10/13/1997
+ Oppnhmr Devl Markets Fd A	8.80 %	17.46 %	34.49 %	31.51 %	N/A	17.27 %	11/16/1998
+ Oppnhmr Global Oppor Fnd A	7.81 %	20.60 %	23.70 %	18.88 %	16.41 %	13.88 %	10/23/1990
+ Janus Nat Resources Fd A	7.20 %	10.61 %	36.66 %	32.22 %	16.66 %	12.83 %	01/22/1999
+ Rydex Small Cap Valu Fnd H	7.26 %	6.82 %	N/A	N/A	N/A	10.13 %	03/29/2004
+ Rydex Midcap Growth Fund H	(4.14 %)	0.81 %	N/A	N/A	N/A	8.52 %	02/26/2004
+ Franklin Sa Bio Disc Fd A	(8.37 %)	(5.26 %)	8.76 %	1.66 %	N/A	8.80 %	09/15/1997
+ Vankamp Real Est Sec Fd A	24.14 %	29.31 %	28.81 %	22.88 %	16.17 %	16.43 %	09/08/1994
+ Alm Energy Fund Ic	2.12 %	1.18 %	34.70 %	22.66 %	18.93 %	10.46 %	01/18/1984
+ Alm Technology Fd Ic	8.13 %	8.92 %	7.31 %	2.62 %	1.66 %	10.63 %	01/03/1984
+ Ivy Science And Tech Fnd Y	4.36 %	9.24 %	16.87 %	10.06 %	N/A	13.84 %	09/08/1998
+ --Europacific Grth Fund R3	11.59 %	19.30 %	22.06 %	14.59 %	10.26 %	13.08 %	04/16/1984
+ Am Cent Sm Cp Value Fd Ac	7.11 %	8.29 %	16.90 %	14.46 %	N/A	14.86 %	07/31/1998
+ Jpm Sm Cap Value Fd Cls A	9.43 %	10.87 %	16.87 %	16.53 %	12.85 %	10.03 %	09/30/1972
+ Federated Midcap Gr Strt A	1.41 %	3.71 %	13.87 %	8.87 %	8.17 %	12.13 %	09/23/1994
+ Janus Adv Gr & Inc S	2.18 %	3.86 %	12.66 %	8.99 %	N/A	7.98 %	05/01/1998
P Janus Twenty Fnd	2.09 %	3.35 %	14.71 %	7.16 %	8.99 %	12.64 %	04/30/1985
+ Nns Ber Genesis Fd Tc	0.84 %	(0.07 %)	15.98 %	16.11 %	13.77 %	13.70 %	09/28/1998
+ Neu Ber International Tr	11.00 %	14.53 %	27.77 %	16.88 %	11.07 %	10.66 %	09/15/1994
+ Opp Global Fnd Cls A	7.98 %	12.79 %	19.22 %	13.27 %	12.70 %	13.81 %	12/27/1988
+ Jpmrgan Health Sciences A	3.33 %	8.84 %	20.56 %	11.91 %	N/A	16.49 %	09/30/1998
+ Rydex Mid Cap Value Fund H	8.02 %	8.25 %	N/A	N/A	N/A	8.95 %	03/30/2004
+ Rydex Large Cap Gr Fund H	0.89 %	1.90 %	N/A	N/A	N/A	0.71 %	03/30/2004
+ Rydex Large Cap Value Fd H	8.41 %	10.24 %	N/A	N/A	N/A	8.09 %	03/30/2004
+ Alm Financial Srvc Fd Ic	8.12 %	18.08 %	11.19 %	7.45 %	16.80 %	13.66 %	05/30/1998
+ Alm Glbl Hlth Care Inv Cls	2.26 %	4.19 %	9.84 %	3.49 %	8.89 %	11.87 %	09/07/1999
+ Alm Midcap Cor Equity Fd A	4.36 %	6.13 %	11.82 %	10.02 %	9.80 %	12.24 %	08/09/1997
+ --Growth Fund Of America R3	3.77 %	8.83 %	13.84 %	9.45 %	12.34 %	14.88 %	11/30/1973
+ Crm Midcp Valu Fd Invst Shr	8.04 %	10.23 %	18.40 %	16.04 %	N/A	14.84 %	09/30/2000
+ Davis Financial Fnd Cls A	9.08 %	18.80 %	14.80 %	9.88 %	12.37 %	16.84 %	05/01/1991
+ Federated Cap Appr Fd A	6.88 %	8.80 %	8.04 %	4.85 %	9.30 %	12.20 %	01/03/1977
+ Janus Adv Ww S	8.20 %	9.18 %	8.38 %	3.25 %	N/A	6.62 %	04/30/1997
+ Opp Cap App Fnd Cls A	2.64 %	6.32 %	8.16 %	4.29 %	7.90 %	13.62 %	01/22/1991
+ Oppnhmr Intl Bond Fd A	3.28 %	2.80 %	8.66 %	14.16 %	8.85 %	8.66 %	09/19/1985
+ Pioneer Midcap Value Fd A	3.88 %	8.81 %	16.79 %	12.72 %	8.98 %	12.68 %	07/29/1980
+ Dws Drmn Hl Rtn Eq A	8.86 %	11.66 %	16.30 %	8.47 %	10.86 %	13.83 %	03/19/1956
+ Ptnco Real Return Fd A	1.27 %	0.63 %	4.23 %	6.83 %	N/A	7.03 %	01/29/1997
+ Thornburg Value Fund Cls I	12.74 %	16.76 %	13.57 %	8.30 %	N/A	8.81 %	11/02/1998
+ Vankamp Comstock Fd A	8.10 %	13.30 %	14.16 %	8.37 %	11.90 %	11.81 %	10/07/1968
+ Wtaf Gov Securities Inv Cl	2.27 %	2.66 %	2.30 %	3.85 %	6.72 %	7.08 %	10/29/1968
+ Selbro Is Hl Yld Bond Fd A	8.26 %	8.61 %	8.47 %	11.09 %	8.35 %	8.20 %	03/23/1988
+ Calvert Income Fd A	3.02 %	3.71 %	4.88 %	6.87 %	7.88 %	N/A	N/A
+ Gdnmsca Ult Sht Dur Govt A	3.10 %	3.88 %	2.20 %	2.18 %	3.88 %	3.87 %	08/16/1988
+ Oppnhmr Ltd Term Govt Fd A	2.80 %	3.47 %	1.83 %	2.81 %	4.31 %	8.02 %	09/16/1988
+ Gartmore Money Mkt Fd Ic	3.11 %	3.88 %	2.07 %	1.57 %	3.12 %	3.70 %	03/03/1980

Fund performance is calculated by Nationwide Financial Services, Inc. This fund performance calculates changes in net assets assuming the reinvestment of capital gains and income dividends, and reflects the underlying fund expenses and the deduction of Nationwide's asset fee of 0.50% for primary(P), 0.30% for primary plus(+). Performance for the funds is based on the current charges being applied to all historical time periods and does not include any other fees or expenses including termination charges, plan or participant fees, or trust fees, if applicable. Any such fees and charges, if applicable and reflected, would lower the performance described above. PAST PERFORMANCE IS NOT A GUARANTEE OF FUTURE RESULTS. Investment returns and principal are not guaranteed and the value at the time of redemption may be worth more or less than its original cost. Nationwide is not making any recommendations regarding these funds. Although data is gathered from reliable sources, Nationwide cannot guarantee its completeness and accuracy. Performance results for the time periods this investment option has been offered in the program are reflected in the figures without "*" to the right of the number. Results that have an "*" to the right of the number are for the underlying fund prior to it being offered within this program. When there is market volatility, current returns may be less than the performance shown. Before investing, understand that mutual funds, collective investment funds and annuities are not insured by the FDIC, NCUSIF, or any other Federal government agency and are not deposits or obligations of, guaranteed by, or insured by, the depository institution where offered or any of its affiliates. Mutual funds, collective investment funds and annuities involve investment risk and may lose value. Investing involves market risk, including possible loss of principal, and there is no guarantee that investment objectives will be achieved. The use of an asset allocation model does not guarantee returns or insulate you from potential losses. For more complete information, including fees, charges and expenses, please refer to additional information, investment profiles and underlying fund prospectuses, if applicable, from your pension representative. Please note your plan may include Collective Investment Funds for which prospectuses are not applicable. Please read the information carefully before investing any money. Certain of the funds are only available as investment options in variable life insurance or variable annuity contracts issued by life insurance companies. They are NOT offered or made available to the general public directly. Trust programs and trust services are offered by Nationwide Trust Company, FSB. Nationwide Investment Services Corporation, member NASD. In MI only: Nationwide Investment Svcs. Corporation.

Nationwide Investment Services Corporation, Member NASD/SIPC. Nationwide Investment Svcs. Corporation, Member NASD/SIPC (In the State of Michigan).

IMPORTANT INFORMATION

Your plan balances are reported using "Unit Values" and "Units". This valuation method allows your account to be valued on a daily basis. Your plan's assets are not part of a collective investment trust or common trust fund. The Unit Value reflects changes in the fund's Net Asset Value, any distributions received (Dividends, Capital Gains or Interest) and any asset fees assessed under the plan. The value of your account, or any transaction thereon, is determined by multiplying the number of Units times the Unit Value. If you have any questions regarding Units or Unit Values, please contact your pension representative.

Your retirement account is always at your fingertips, 24 hours a day, seven days a week.

Call our INQUIRE line at 1-800-772-2182 or

visit our web site at www.nationwide.com

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No. 06-856

FILED
AUG 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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August 2007

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IN THE

Supreme Court of the United States

No. 06-856

JAMES LaRUE, PETITIONER,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

INTRODUCTION

The two questions on which this Court has granted certiorari affect the rights of tens of millions of American workers and retirees. For this reason, petitioner's position has received the support of the United States, the American Association of Retired Persons, the Pension Rights Center, the National Employment Lawyers' Association, the Air Line Pilot's Association International, the Self Insurance Institute of America, and a coalition of law professors.[1] In an eleventh hour attempt to avoid the resolution of these two

[1] Counsel for both petitioner and respondents have consented to the filing of briefs *amicus curiae* in support of petitioner by these groups.

important questions, respondents have filed a frivolous motion to dismiss the writ.

1. Respondents' motion is predicated entirely on their recent "discovery" that, in July 2006, petitioner "withdrew all of his funds from his account in the DeWolff [Plan]." Motion to Dismiss the Writ ("MTD") at 2. Thus, respondents conclude that "at the time the Petition was filed, Petitioner was not then, and is not now, a participant in the DeWolff Plan." *Id.* This conclusion is baseless. The statutory term "participant" is defined in section 3(7) of ERISA, 29 U.S.C. 1002(7). As explained in Part I., *infra*, this definition of "participant" expressly includes a "former employee" who "may become eligible to receive a benefit of any type" from the ERISA plan at issue. This Court has held that the definition includes any "former employee" who has "a colorable claim that * * * he or she will prevail in a suit for benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-118 (1989). As explained in detail in Part I., *infra*, petitioner unquestionably meets this definition.[2] As such, respondents' motion must be denied.

2. Even if there were a colorable argument that petitioner is no longer a participant in the DeWolff Plan, respondents' motion would still have no merit.

a. Respondents' first argument in favor of dismissing the writ is an inexplicable suggestion that this case is now moot. Even if petitioner's withdrawal of $119,000 could support a colorable argument that he is no longer a participant under ERISA, the mere existence of such a potential argument would certainly not moot this case. As explained in Part II., *infra*, a legal and factual dispute over whether petitioner is a participant under ERISA does not mean that he has no personal stake in this litigation.

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[2] In conclusorily asserting otherwise, the motion filed by respondents does not even make a passing reference to section 3(7) of ERISA.

b. Respondents next argue that this case must be dismissed because resolution of the two questions presented requires this Court first to adjudicate whether or not petitioner remains a participant in the DeWolff Plan. As explained in Part III., *infra*, this argument is unfounded. It presumes that whether petitioner is a participant under ERISA is a question of standing that must be adjudicated prior to the resolution of any other issues in the case. This presumption is wrong. Respondents' argument (which involves both legal and factual questions that petitioner will dispute) is nothing more than an additional defense on the merits that respondents may assert on remand if, and when, petitioner prevails in this Court.

c. Finally, respondents argue that the writ should be dismissed because it now "presents additional legal issues beyond the scope of the questions presented by the Petition." MTD at 7. As explained in Part IV, *infra*, this argument is groundless for two independent reasons.

First, what the motion refers to as "new legal issues" is nothing more than a single "perceived misstatement of fact or law in the petition" (*i.e.*, petitioner's claim that he is a participant). Supreme Court Rule 15.2. Respondents waived any right to assert such a perceived misstatement when they failed to raise the issue in their brief in opposition to the petition for a writ of certiorari. Respondents' motion for dismissal is predicated entirely on the July 2006 withdrawal by petitioner of $119,000 from the DeWolff Plan. This event occurred *six months before* respondents filed their brief in opposition. Although respondents claim to have recently "discovered" the July 2006 withdrawal, they cannot avoid their obligations under Rule 15.2 by merely claiming to have been unaware of a withdrawal of plan funds when one re-

spondent is the fiduciary of the plan and the other respondent is the Plan itself.[3]

Second, respondents' claim that petitioner is no longer a "participant" is nothing more than a post-pleading defense on the merits that has no bearing on the two legal questions before this Court. This Court granted certiorari on two purely legal questions regarding the scope of relief available to a "participant" under ERISA. Because the lower courts resolved this case on a Federal Rule of Civil Procedure 12(c) motion, they *accepted as pled* the fact that petitioner is a participant in the DeWolff Plan. The fact that respondents could conceivably prevail later in this litigation by convincing a lower court (via some non-pleading motion) that petitioner has lost his "participant" status has no relevance to the proceedings before this Court. This Court regularly adjudicates cases in which a Rule 12(c) motion has been granted by the lower courts. In so doing, the Court does not concern itself with issues on which the plaintiff could *conceivably* lose on remand. Put simply, this case remains an ideal vehicle through which to resolve the two important questions on which certiorari has been granted.

3. For the reasons outlined above, which are each explained in more detail below, respondents' motion should be denied. Should the Court have any inclination to consider the merits of respondents' argument, however, petitioner requests that the Court defer such consideration to the hearing of the case on the merits. See, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 494-495 ("postpon[ing] * * * consideration of [respondents' suggestion of mootness] to a hearing on the merits"). See also *Hamdan v. Rumsfeld*, 126 S. Ct. 1317 (2006); *Oregon v. Guzek*, 126 S. Ct. 675 (2005).

---

[3] Respondents' motion does not even allege that *no* employee of DeWolff was previously aware of petitioner's withdrawal. See MTD App. at 1a (Decl. of Morgan Buffington ¶2) (merely stating that *one officer* of DeWolff recently learned of petitioner's withdrawal of $119,000).

ARGUMENT

I. PETITIONER IS A "PARTICIPANT" UNDER SECTION 3(7) OF ERISA

Respondents claim to have recently "discovered that * * * Petitioner withdrew all of his funds from his account in the DeWolff [Plan]" and that, as a result of that withdrawal, petitioner is no longer a participant in the DeWolff Plan (and was not a participant when he filed his petition for certiorari in this Court). MTD at 2. Respondents' assertion that petitioner is no longer a participant in the DeWolff Plan is baseless.

A retiree driven to withdraw his remaining balance from a 401(k) account that he believes to have been depleted by fiduciary misconduct unquestionably constitutes a participant under both the express terms of ERISA and this Court's precedent. The contrary position—that a former employee whose 401(k) account has been partially depleted through fiduciary theft or negligence must leave his remaining funds with the thief or mismanager in order to continue litigating to recover the monies already lost—finds no support anywhere in the text of ERISA or this Court's caselaw. Unsurprisingly, this contrary position—now urged by respondents—has been explicitly rejected by every court of appeals to have addressed the issue, see *Graden v. Conexant Systems Inc.*, No. 06-2337, 2007 WL 2177170 (CA3 July 31, 2007); *Harzewski v. Guidant Corp.*, 489 F.3d 799 (CA7 2007), as well as by the United States.[4]

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[4] The United States Department of Labor has appeared in several cases including *Graden* and *Harzewski* to argue against the position asserted by respondents in their motion.

A. "Participant" is defined by ERISA and this Court to include any "former employee" with "a colorable claim" that he "will prevail in a suit for benefits"

Respondents' only support for its supposed *legal* conclusion that petitioner is no longer a participant within the meaning of ERISA is a citation to a *declaration* of one of its employees. See MTD at 2 (citing Declaration of Morgan Buffington for the proposition that "Petitioner * * * ceased to be a participant in the Plan" as a result of his withdrawal of funds from his account). Moreover, respondents' motion makes absolutely no mention of section 3(7) of ERISA, which expressly defines the term "participant" as

> any employee *or former employee* of an employer * * * *who is or may become eligible* to receive a benefit of any type from an employee benefit plan which covers employees of such employer.

29 U.S.C. 1002(7) (emphasis added).[5]

In addition to omitting entirely any reference to the operative statutory definition, respondents also fail to meaningfully address this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In that case, this Court explicitly held that a former employee is a "participant" under ERISA if he has "a colorable claim that * * * he or she will prevail in a suit for benefits." *Id.* at 117-118.

---

[5] Congress knew how to narrow the term participant when it wanted to do so. For example, section 101(a) of ERISA uses the phrase "participant *covered under a plan*" to narrow the class of people to whom plan administrators must provide information, in many cases without charge and without request, under ERISA's automatic disclosure requirements. 29 U.S.C. 1021(a) (emphasis added); see also 29 C.F.R. 2510.3-3(d) (providing a regulatory definition of the phrase "participant covered under a plan" that is considerably narrower than the broad definition of "participant" in 29 U.S.C. 1002(7))); 29 C.F.R. 2509.95-1(b) (clarifying that 29 C.F.R. 2510.3-3(d) does not affect who is a participant for purposes of bringing suit under section 502(a)(2) of ERISA).

There is no dispute that petitioner is a "former employee" of DeWolff. And he asserts in this very lawsuit that he is entitled to additional benefits under the DeWolff Plan because the breach of fiduciary duty by respondents caused the DeWolff Plan, and therefore his individual account within the Plan, to hold fewer assets than it would have held had his investment instructions been followed. This Court's resolution of the two questions on which certiorari has been granted (*i.e.*, whether petitioner is seeking to restore "any losses to the plan" within the meaning of sections 502(a)(2) and 409 and whether he is seeking "appropriate equitable relief" within the meaning of section 502(a)(3)) will determine whether petitioner may continue with his lawsuit and, thus, whether he "may become eligible to receive a benefit of any type" from the DeWolff Plan. See 29 U.S.C. 1002(7) (defining "participant" to include a "former employee * * * who is or may become eligible to receive a benefit of any type").

B. The withdrawal by petitioner of $119,000 from his 401(k) account in July of 2006 has no relevance to this lawsuit

Petitioner does not contest that he is a former employee of DeWolff who, after being injured by respondents' misconduct, withdrew $119,000 from his 401(k) account in the DeWolff Plan.[6] Based entirely on the fact that petitioner made this withdrawal, respondents mistakenly conclude that he is

---

[6] It is hardly surprising that petitioner chose to withdraw the *undisputed* portion of his interest in the DeWolff Plan. At the time of his withdrawal in July of 2006, he was no longer an employee of DeWolff and had already spent over two years in litigation trying to restore to the plan monies that were lost through respondents' misconduct. See BIO App. 1a-42a (June 2, 2004, complaint filed by petitioner). What is surprising, however, is the fact that respondents continued to litigate with petitioner for more than *a year* and supposedly without any knowledge of a fact that they now claim to be legally dispositive. The legal significance of respondents' inaction is discussed in Part IV, *infra*.

now a "former participant" with no right to pursue litigation to recover his lost benefits.

The term "former participant" is nowhere defined in ERISA. As explained above, what *is* defined is the term "participant." 29 U.S.C. 1002(7). Rather than so much as attempt to argue that petitioner does not satisfy the statutory definition of "participant," respondents have instead summarily labeled him a "*former* participant," hoping to merely assert that which they cannot establish.

Respondents' concept of "former participant" is predicated on the mistaken notion that a retiree's eligibility to obtain plan benefits ends when his account balance becomes zero. That is not the case.[7] Imagine if a retired employee of DeWolff had $50,000 in his individual plan account and that, one day, DeWolff stole the full $50,000, leaving the retiree with a zero balance. Under respondents' reasoning, the retiree would be a "former participant" no longer "eligible" to receive any benefits because he has a zero account balance and no ability (as a *former* employee) to make new contributions to his individual account. That is preposterous. Benefits necessarily include what one would have had in one's plan account absent the fiduciary breach. See, *e.g.*, *Harzewski*, 489 F.3d at 804-05 ("The benefit in a defined contribution plan is, to repeat, just whatever is in the retirement account when the employee retires or *whatever would have been there had the plan the plan honored the employee's entitlement*, which includes an entitlement to prudent man-

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[7] Perhaps respondents' confusion is the result of an implicit (and incorrect) assumption that a participant's individual account balance always represents that participant's *entire* cognizable interest in the plan. A simple example illustrates the folly of such an assumption: if a former employee has a balance of $50,000 in his 401(k) account and the plan fiduciary, through an administrative error, re-allocates half of this amount to the account of a different participant in the plan, the former employee is still entitled to $50,000 in plan benefits notwithstanding the fact that his account now only shows a balance of $25,000.

agement." (emphasis in original)). One's eligibility to recover lost benefits does not cease when one's account balance is zero. Were that so, breaching fiduciaries would have every incentive to steal the remainder of an injured retiree's account, so as to deprive him of the right to sue for the recovery of the initial losses. Or worse, they could steal the entirety of a retiree's account in the first place.

Respondents undoubtedly believe that the situation here is distinguishable from the above example because petitioner "voluntarily" reduced his account balance to zero.[8] That is a distinction without a difference. Whether a former employee is entitled to a plan benefit does not turn on whether he is seeking to restore his account balance from $50,000 to $100,000 or from $0 to $50,000. In other words, there is nothing in the definition of "participant" to suggest an analytical difference between (1) a former employee whose individual plan account was reduced from $100,000 to $50,000 through fiduciary misconduct who sues to restore the balance to $100,000 and (2) another former employee who suffers the same fate but chooses first to withdraw the $50,000 left in the account and then sue to restore the balance to $50,000. Respondents' position would require that a retiree who has been a partial victim of fiduciary theft or negligence leave his remaining funds with the thief or tortfeasor in order to have the right to pursue (through litigation) the lost benefits. There is nothing in the text of ERISA or this Court's cases interpreting it to suggest that Congress intended such a rule.[9]

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[8] For the purposes of this motion only, petitioner will not dispute any of the facts alleged by respondents. Of course, petitioner reserves the right to dispute these facts should respondents assert this defense (*i.e.*, that petitioner is not a "participant") at the appropriate time (*i.e.*, on remand if petitioner's interpretation of section 502(a) is accepted by this Court).

[9] Respondents mischaracterize various cases from the courts of appeal in an effort to manufacture a legal controversy. For example, re-

II. THIS CASE IS NOT RENDERED MOOT BY RESPONDENTS' NEW CLAIM THAT PETITIONER IS NOT A "PARTICIPANT"

Respondents' first argument in favor of dismissing the writ is a suggestion that this case is moot. Even if petitioner's withdrawal of $119,000 could support a colorable argument that he is no longer a "participant" under ERISA, however, the existence of such a potential argument would not moot this case. Respondents' suggestion of mootness reveals a fundamental misunderstanding of the meaning of the term. As explained below, a legal and factual dispute over whether petitioner is a participant under section 3(7) of ERISA does not suddenly deprive petitioner of any personal interest in the outcome of this case. It is difficult to understand the precise basis for respondents' mootness argument because it is articulated in such a conclusory fashion. As such, petitioner responds separately to both possible articulations of "mootness" contained in respondent's motion.

First, respondents' motion repeatedly suggests that this case is moot because petitioner is no longer a participant in the DeWolff Plan. See, *e.g.*, MTD at 2 ("The newly discovered fact that Petitioner is no longer a participant in the Plan moots this case."); *id.* at 3 ("Many lower courts have held that *former* plan participants may not bring suit under

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spondents state that "[m]any lower courts have held that former plan participants may not bring suit under section 502(a)(2)," MTD at 3 (emphasis in original) (citing cases from the Ninth and First Circuits), whereas "[o]ther courts have ruled that former participants can pursue a section 502(a)(2) claim for additional benefits under the terms of the plan." *Id.* (citing a case from the Fifth Circuit). This statement is false. A "former *participant*" can never bring a claim under ERISA. The various court of appeals opinions cited by respondents merely address whether or not the former *employee(s)* involved in those cases were asserting colorable claims for benefits and, thus, *participants* under the statute. See, *e.g.*, *Crawford v. Lamantia*, 34 F.3d 28, 33 (CA1 1994) (holding that the former employee "failed to show that defendants' * * * breach of fiduciary duty had a direct and inevitable effect on *his* benefits" (emphasis in original)).

section 502(a)(2)." (emphasis in original) (citations omitted)); *id.* at 4 ("[B]ecause Petitioner is no longer a Plan participant, he lacks 'a still vital claim for prospective relief.'" (citation omitted)). Respondents' argument that petitioner is no longer a participant, however, is nothing more than a garden-variety legal defense. A brief examination of respondents' argument illustrates why such a defense is not the basis of a mootness challenge. As explained above, section 3(7) of ERISA defines the term "participant." 29 U.S.C. 1002(7). If one is a participant under section 3(7), he or she is authorized to bring suit under section 502(a) of ERISA. 29 U.SC. 1132(a) (authorizing a "participant" to bring several different types of civil actions). Whether an individual satisfies the definition of "participant" in § 3(7) of ERISA may involve disputed issues of law and/or disputed issues of fact. The motion filed by respondents provides an example of both such disputes.

Respondents' new argument that petitioner is not a participant in the DeWolff Plan presents a contested issue of law. As explained in Part I., *supra*, petitioner takes the position that, even if the facts regarding his $119,000 withdrawal are as respondent has alleged, he is a "participant" under § 3(7) of ERISA. See 29 U.S.C. 1002(7) (defining "participant" to include a "former employee * * * who is or may become eligible to receive a benefit of any type.").[10] Respondents' new argument may also present several contested issues of fact. In addition to disputing respondents' legal interpretation of 29 U.S.C. 1002(7), petitioner may ultimately dispute one or more of the facts alleged by respondents regarding his $119,000 withdrawal. As this Court explained in *Powell v. McCormack*, 395 U.S. 486, 500 (1969) ("[R]espondents [argument] confuses mootness with [a de-

[10] Describing this as a disputed legal question is quite charitable to respondents. As already noted above, respondents' legal position has been explicitly rejected by every court of appeals to have addressed the issue, as well as by the United States.

fense on the merits; namely,] whether Powell has established a right to recover against the Sergeant at Arms, a question which it is inappropriate to treat at this stage of the litigation.").

Second, the motion repeatedly asserts that petitioner's claim is moot because, according to respondents, he cannot personally obtain any relief even if his interpretation of sections 502(a)(2) and/or 502(a)(3) is accepted. See, *e.g.*, MTD at 4 (asserting that "the only way the recovery sought under [petitioner's] theory would reach Petitioner is through a payment directly to Petitioner."); *id.* at 3 ("Petitioner's 502(a)(2) claim is moot because, under the legal theory supporting this claim, there is no type of relief in which Petitioner would have any legally cognizable interest."); *id.* at 4 (asserting that "any recovery achieved by the Plan would not benefit the Petitioner, because it could only go to the Plan."). This assertion, however, is predicated entirely on the assumption that petitioner is no longer a "participant" in the DeWolff Plan which, as explained above, is itself nothing more than a defense on the merits that cannot be asserted by respondents at this stage in the proceedings.

A brief examination of petitioner's theory of recovery illustrates this point. As will be explained at length in his opening brief, which must be filed with this Court in 5 days, petitioner's position is that both sections 502(a)(2) and 502(a)(3) entitle a 401(k) plan participant to seek repayment to his ERISA plan of losses that were caused by fiduciary breach. If petitioner prevails in this Court, he will then continue to litigate the merits of his claim. Respondent is free, of course, to seek summary judgment on the ground that petitioner is no longer a participant under ERISA. If, however, respondents do not succeed with such an argument and petitioner ultimately obtains a judgment against respondents, this judgment will be paid directly to the DeWolff Plan. At that point, respondents will be required under ERISA to allocate some or all of these recovered monies to petitioner's 401(k) account in the plan. See, *e.g.*, Employee

Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2006-1*, at 8 (Apr. 19, 2006) <http://www.dol.gov/ebsa/pdf/fab2006-1.pdf> ("[A] plan fiduciary must be prudent in the selection of a method of allocating settlement proceeds among plan participants. Prudence in such instances, at a minimum, would require a process by which the fiduciary chooses a methodology where the proceeds of the settlement would be allocated, where possible, to the affected participants in relation to the impact the [fiduciary breach] may have had on the particular account."). Thus, the fact that respondents could conceivably convince a lower court that petitioner is not a participant does not render this case moot. The fact that respondents could conceivably convince a lower court that petitioner is not a participant is no different than the fact that they might convince a lower court that no fiduciary duty was breached. The existence of such legal defenses does nothing to support respondents' groundless assertion that there is no longer a live controversy in which petitioner has a current interest.

III. Neither Question Presented Requires That This Court Address Respondent's New Claim

Apart from their suggestion of mootness, respondents appear to argue that dismissal of the writ is warranted because resolution of the two questions presented requires this Court to first adjudicate whether petitioner remains a "participant" in the DeWolff Plan. See, *e.g.*, MTD at 7 (asserting that "[t]he new question whether the change in Petitioner's status precludes his theories * * * appears logically antecedent to the issues on which the Court granted *certiorari*"). Respondents are wrong. The two questions on which this Court has granted certiorari do not require this Court to decide whether petitioner is a "participant," just as they do not require this Court to decide whether respondents did, in fact, breach their fiduciary duty. Both are legal issues that respondents may choose to contest on remand should petitioner prevail in this Court.

Respondents' belief that petitioner's status as a "participant" under 29 U.S.C. 1002(7) is "logically antecedent" to the questions presented presumes that whether petitioner is a participant under ERISA is a question of standing that must be adjudicated prior to the resolution of any other issues in the case. This presumption is wrong. The Seventh Circuit explained this point in a recent case (*Harzewski, supra*) presenting the precise facts at issue here. Writing for the court, Judge Posner rejected the argument that the named plaintiffs in a class action lawsuit against the fiduciaries of a defined contribution plan lacked standing to sue under section 502(a)(2) merely because those plaintiffs had "cashed out" of the plan after the complaint had been filed. In addition to explaining why such named plaintiffs were certainly "participants" within the meaning of ERISA, Judge Posner cogently explained why such an assertion is not a standing argument, but rather is merely a defense on the merits. In his words:

> Obviously the named plaintiffs have standing to sue in the sense of being entitled to ask for an exercise of the judicial power of the United States as that term in Article III of the Constitution has been interpreted, because if they win they will obtain a tangible benefit. But there is also a nonconstitutional doctrine of standing to sue, one aspect of which is the requirement that the plaintiff be within the "zone of interests" of the statute or other source of rights under which he is suing.
>
> * * *
>
> But if "zone of interests" were interpreted too broadly, standing and merits would merge, since any time a plaintiff failed to prove that the statute under which he was suing entitled him to relief, thus revealing that he was not someone whose interests the statute had been intended to protect, his suit would be dismissed for want of standing. * * * Except in extreme cases * * *, the question

> whether an ERISA plaintiff is a "participant" entitled to recover benefits under the Act should be treated as a question of statutory interpretation fundamental to the merits of the suit rather than as a question of the plaintiff's right to bring the suit.

Harzewski, 489 F.3d at 803-04.

Judge Posner's reasoning and concern about merging the standing and merits analyses apply with equal force to this case: respondents' very arguments about why the writ should be dismissed are largely identical to their arguments about why petitioner fails to state a claim under section 502(a). That is, respondents' putative "procedural challenge" merges with their merits-based argument that petitioner has "failed to prove that the statute under which he was suing entitled him to relief, thus revealing that he was not someone whose interests the statute had been intended to protect." *Id.*[11]

IV. RESPONDENTS' NEW CLAIM SHOULD NOT BE ADDRESSED BY THIS COURT.

As explained above, resolution of the two questions presented certainly does not require this Court to address the new legal question that DeWolff is attempting to raise. Nonetheless, respondents' maintain that the writ should be dismissed because it now "presents additional legal issues beyond the scope of the questions presented by the Petition." MTD at 7. This argument is groundless for two independent reasons.

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[11] In any event, even those courts of appeal that refer to this issue as one of "statutory standing" acknowledge that it is not a threshold matter. See, *e.g., Coan v. Kaufman,* 457 F.3d 250, 256 (CA2 2006) ("Although we have referred to a plaintiff's status as a 'participant' under ERISA as a question of 'standing,' * * * it is a statutory requirement, not a constitutional one. Unlike Article III standing, which ordinarily should be determined before reaching the merits * * * statutory standing may be assumed for the purposes of deciding whether the plaintiff otherwise has a viable cause of action.").

A. Respondents' new claim has been waived

As respondents themselves observe, this Court granted certiorari after both the petition for a writ of certiorari and the Solicitor General's invitation brief asserted that petitioner was a participant in the DeWolff Plan. MTD at 2 (quoting Petition at 5, 8 and U.S. Brief at 2). As explained in Part I., *supra*, petitioner remains a "participant" within the meaning of section 3(7) of ERISA. Respondents' new contention that petitioner is not a participant is nothing more than an argument that should have been included in respondents' brief in opposition to the petition for writ of certiorari.[12]

Respondents' argument is in reality what this Court's Rule 15.2 refers to as a "perceived misstatement of fact or law in the petition that [arguably] bears on what issues properly would be before the Court if certiorari were granted."[13] Rule 15.2 of this Court states that:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in

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[12] By improperly treating their new legal argument as if it has already been accepted, respondents beg the very issue presented by the motion. MTD at 7 ("It is, at a minimum, clear that the question whether Petitioner can continue to pursue his claims * * * now that he is no longer a participant in the Plan was not presented in the Petition. Petitioner's change of status would thus seem to require the Court to decide a legal issue raised here for the first time.").

[13] Petitioner has inserted the word "arguably" into the text of Rule 15.2 because, as explained in Section IV.B, *infra*, there is no way that respondents' "perceived misstatement" (even if true) could have any effect "on what issues properly would be before this Court").

> opposition, and not later, any perceived misstatement made in the petition.

Respondents' failure to argue that petitioner is no longer a "participant" in its brief in opposition presents a textbook case of waiver.

The only factual event that forms the basis for respondents' dismissal argument is petitioner's July 2006 withdrawal of non-disputed funds from the DeWolff Plan. This event occurred *six months before* respondents filed their brief in opposition (and prior to the Fourth Circuit's issuance of its mandate). The existence of petitioner's July 2006 withdrawal was in no way hidden from respondents. After all, one of the two respondents is the very ERISA plan from which petitioner made his withdrawal, and the other respondent is the fiduciary of the plan. Thus, respondents' claim to have only recently "discovered" the existence of petitioner's July 2006 withdrawal is irrelevant.

This Court has regularly rejected such attempts to avoid the spirit of Rule 15.2. For example, in *Canton v. Harris*, 489 U.S. 378 (1989), this Court noted that:

> Petitioner's petition for certiorari challenged the soundness of that conclusion, and respondent did not inform us prior to the time that review was granted that petitioner had arguably conceded this point below. Consequently, we will not abstain from addressing the question before us.

Id. at 385. Similarly, in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), this Court observed that:

> Respondents also argue that the benefit due under their ERISA-regulated employee benefit plans is simply the membership in the respective HMOs, not coverage for the particular medical treatments that are delineated in the plan documents. See Brief for Respondents 28-30. Respondents did not identify this possible argument in their brief in op-

> position to the petitions for certiorari, and we deem it waived. See this Court's Rule 15.2.

Id. at 212 n2.

In sum, this Court should proceed to address the two questions on which it granted certiorari. These important questions, unlike respondents' new argument, were squarely presented to and decided by the court of appeals. In the words of this Court,

> Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived. Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it.

Oklahoma City v. Tuttle, 471 U.S. 808, 815-16 (1985) (emphasis in original).

B. Respondents' new claim is improper

In attempting to press its new argument at this point in time and before this Court, respondents fundamentally misunderstand the procedural posture of this case. In reviewing the propriety of an order granting a Rule 12(c) motion for judgment on the pleadings, this Court must take as true all of the allegations in the complaint, see, *e.g.*, Pet. App. 16a (where the district court noted that "[w]hen considering dismissal, a plaintiff's well pleaded allegations are taken as true, and the complaint, including all reasonable inferences, is construed liberally in the plaintiff's favor" (citation omitted)); *id.* at 3a (where the Fourth Circuit noted that "[a]ccepting the allegations as pled, as we must, we shall assume without deciding that defendants' alleged conduct amounted to a breach of their fiduciary duties"), including

the allegation that petitioner is a participant. See, *e.g.*, Pet. App. 15a (where the district court observed that "Plaintiff is a participant in an employee savings plan administered by DeWolff"); *id.* at 2a (where the Fourth Circuit observed that "Plaintiff James LaRue has participated in this 401(k) plan since 1993").

Petitioner sought a writ of certiorari, and this Court granted the writ to decide two questions: first, whether the relief sought by petitioner is available to a participant under section 502(a)(2) of ERISA and second, whether the relief sought by petitioner is available to a participant under section 502(a)(3) of the statute. Petitioner's complaint does not allege any facts that undermine the conclusion that he is a participant. As such, if respondents wish to challenge that allegation, they must do so by introducing material outside the pleadings (*i.e.*, evidence) in a motion for summary judgment. And it is beyond question that such a motion can be made only on remand to the district court—not in an affidavit in this Court.

Respondents' new argument that petitioner is no longer a participant in the DeWolff Plan, even if colorable, is no different than if respondents were now suggesting that new evidence had recently come to light to definitively prove that they had in fact followed petitioner's investment instructions, or that their failure to follow petitioner's investment instructions actually caused an increase in the value of his account (and the Plan), rather than a loss. Once this Court has decided that a petition for writ of certiorari should be granted, it does not concern itself with the *possibility* that the plaintiff might ultimately lose his or her case on remand. Such is the fate of many litigants before this Court. Where certworthy legal questions are squarely presented in a case—as they are here—this Court will proceed to resolve those questions. Petitioner does not ask this Court for guaranteed success in his lawsuit; instead he asks this Court for a chance to move forward with his claims. By correcting the lower courts' mistaken interpretation of sections 502(a)(2)

and 502(a)(3), this Court will clear the way for petitioner—and many other litigants like him—to play their part in the critically important remedial scheme of ERISA.

CONCLUSION

The motion to dismiss the writ should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JAMES LaRUE, PETITIONER

v.

DeWOLFF, BOBERG & ASSOCIATES, INC.; AND DeWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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AUGUST 2007

QUESTIONS PRESENTED

1. Whether section 502(a)(2) of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses are attributable to the participant's individual plan account.

2. Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks "equitable relief" within the meaning of ERISA section 502(a)(3), 29 U.S.C. 1132(a)(3).

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IN THE

Supreme Court of the United States

No. 06-856

JAMES LARUE, PETITIONER,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The original opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 450 F.3d 570. The order and opinion of the district court granting respondents' motion for judgment on the pleadings (Pet. App. 15a-21a) and the order of judgment dismissing petitioner's complaint (Pet. App. 30a-31a) are unpublished. The order denying a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 22a-29a) is published at 458 F.3d 359.

JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on August 8, 2006. The petition for a writ of certiorari was filed on November 6, 2006, and granted on June 18, 2007. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, Tit. I, 88 Stat. 829 (29 U.S.C. 1001 *et seq.*), are set forth in the appendix to this brief.

INTRODUCTION

Like tens of millions of Americans, petitioner James LaRue attempted to save for his retirement by contributing money to what is commonly referred to as a 401(k) plan. This 401(k) plan was sponsored, and is maintained, by petitioner's former employer, respondent DeWolff, Boberg & Associates, Inc. ("DeWolff"). The plan itself, also a respondent here, is known as the DeWolff, Boberg & Associates Employees' Savings Plan (the "DeWolff Plan"), and is governed by ERISA. BIO App. 9a, 12a.

On June 2, 2004, petitioner filed a lawsuit against respondents. In this lawsuit, petitioner alleged that his 401(k) account balance in the DeWolff Plan had been depleted by approximately $150,000 as the result of respondents' misconduct. *Id.* at 2a-4a. Petitioner's principal allegation was that respondents breached their fiduciary duties under ERISA by ignoring his investment instructions. *Id.* at 3a-4a ("On at least two occasions, the Plaintiff directed the plan * * * to invest his money and contributions a certain way, but the plan and its administrator, DeWolff, failed to invest Plaintiff's money as directed."). As a remedy, petitioner requested that the court order respondents "to reimburse to the plan amounts necessary so that [his] interest in the plan is what it should have been, but for [respondents' misconduct]." *Id.* at 50a.

Although this lawsuit has been pending for over three years, no court has ever addressed whether respondents did, in fact, violate ERISA. This is because respondents persuaded the district court and the court of appeals that ERISA does not subject the fiduciary of a 401(k) plan to any monetary liability for account losses suffered by an *individ-*

ual 401(k) account holder whose investment instructions were ignored. See generally Pet. App. 1a-14a, 15a-21a, 22a-29a. As both petitioner and the United States argued in the court of appeals, the lower court's judgment is based on a fundamental misinterpretation of both section 502(a)(2) (29 U.S.C. 1132(a)(2)) and section 502(a)(3) (29 U.S.C. 1132(a)(3)) of ERISA. This erroneous interpretation of two of the statute's most important remedial provisions will diminish the retirement security of tens of millions of American workers and retirees.

In an effort to articulate petitioner's legal position clearly and in its proper context, this brief first provides some necessary background regarding ERISA. It then recounts the procedural history of this case.

STATEMENT

A. Statutory Background

After many years of study and debate, Congress enacted ERISA in 1974. "ERISA was Congress's attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years." James A. Wooten, *The Employee Retirement Income Security Act of 1974, a Political History* 1 (2004). In the words of Congress, "the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial [and] the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 29 U.S.C. 1001(a).[1]

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[1] ERISA regulates both pension and welfare plans. 29 U.S.C. 1002(3). A "pension plan" is defined to include "any plan, fund, or program * * * established or maintained by an employer" that "(i) provides retirement income" or "(ii) results in a deferral of income by employees." 29 U.S.C. 1002(2)(A). A "welfare plan" is defined to include "any plan, fund, or program * * * established or maintained by an employer" that "provid[es] medical, surgical or hospital care or benefits, or benefits in the

The importance of ERISA today can hardly be overstated. Other than Social Security, "employer-sponsored retirement plans are the single largest source of income for aged Americans." Wooten, *supra*, at 1-2 (citations omitted). "About fifty million private-sector employees, including a majority of year-round, full-time workers, participate in a retirement plan regulated by ERISA." *Id.* at 2 (citations omitted). As of the end of 2006, these retirement plans held more than $5.5 trillion in assets. Board of Governors of the Fed. Reserve Sys., *Flow of Fund Accounts of the United States: Flows and Outstandings, First Quarter 2007,* Statistical Release Z.1, at 113 (June 7, 2007) <http://www.federalreserve.gov/releaes/Z1/Current/z1.pdf> (hereinafter, "Fed. Reserve Statistical Release").

1. The two types of pension plans under ERISA

ERISA groups every pension plan into one of two categories: "defined benefit" (29 U.S.C. 1002(35)) or "defined contribution" (29 U.S.C. 1002(34)). See also U.S. Dep't of Labor Website, *Find It! By Topic, Retirement Plans, Benefits & Savings: Types of Retirement Plans* <www.dol.gov/dol/topic/retirement/typesofplans.htm> (explaining the difference between a defined benefit plan and a defined contribution plan) (hereinafter, "DOL Website").

A defined benefit plan promises to pay a fixed retirement benefit, usually monthly, for the life of the participant and his or her spouse. The amount of such a benefit is typi-

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event of sickness, accident, disability, death or unemployment." 29 U.S.C. 1002(1). Other than Medicare, most health insurance in the United States is provided through ERISA-governed welfare plans. See Loraine Schmall & Brendan Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights,* 42 Brandeis L.J. 529, 538 (2004); John H. Langbein & Bruce A. Wolk, *Pension & Employee Benefit Law* 892 (3d ed. 2000) (noting that, in the United States, "most health care for the nonelderly is delivered through ERISA-covered employee benefit plans"). Although this case involves a pension plan and not a welfare plan, resolution of the questions presented will likely have a significant impact on both pension *and* welfare plans.

cally determined pursuant to a formula that takes into account the participant's years of service and compensation. See Emp. Benefit Res. Inst., *Fundamentals of Employee Benefit Programs* 56 (5th ed. 1997). Conversely, a defined contribution plan does *not* promise a specific amount of benefits at retirement. Instead, an employee who participates in a defined contribution plan is assigned an individual account within the plan to which money is contributed by the employee and/or his employer.[2] The employee is the beneficial owner of the funds allocated to his or her individual account within the plan.[3] Among the different types of defined contribution plans are 401(k) plans like the one involved in this case. See DOL Website, *supra* (explaining that "defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans"). See also BIO App. 12a (noting that the DeWolff "Plan is a type of qualified retirement plan commonly referred to as a 401(k) plan").

2. The concept of "administration risk"

In every pension plan—regardless whether it is of the defined benefit or defined contribution variety—there exists what is often called "administration risk." Put simply, administration risk is "the danger that the persons responsible for managing and investing plan assets and paying claims may abuse their authority." See John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1323 (2002). It includes the risk that "[t]hey may do their job badly, or misuse plan assets for personal gain, or

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[2] This is why section 3(34) of ERISA uses the term "defined contribution plan" and "individual account plan" interchangeably. 29 U.S.C. 1102(34).

[3] At any given time, this balance is equal to the total amount of past contributions adjusted to reflect the account's share of three things: (1) any income or expenses, (2) any gains or losses, and (3) any forfeitures of other participants' accounts. 29 U.S.C. 1102(34).

improperly refuse to pay promised benefits." *Id.* (footnotes omitted).[4]

As this Court has repeatedly recognized, protecting workers and retirees against administration risk was the primary objective of Congress in enacting ERISA. See, *e.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) ("[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and * * * ERISA was designed to prevent these abuses in the future."); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) ("In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.") (citation and footnote omitted).[5]

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[4] Administration risk is not unique to pension plans. See Langbein, *supra*, at 1323. ("[T]he assets in a nonpension [*i.e.*, welfare] plan [may be] exposed to [the same] abuse as those of a pension fund."). As such, "Congress determined to bring [these] nonpension plans under ERISA's coverage" so that it could "subject them to ERISA fiduciary law." *Id.*

[5] Another main purpose of Congress in enacting ERISA was the elimination of a particular hazard largely unique to defined benefit plans known as "default risk." Any defined benefit plan necessarily presents a risk of default "because the plan promises today's worker to pay benefits far in the future." Langbein, *supra*, at 1323. Thus, before benefits are actually paid, "the plan can become insolvent, or it can renege in other ways on the pension promise." *Id.* Default risk was a substantial concern in 1974 because the pension system at that time was dominated by defined benefit plans. Wooten, *supra*, at 278 ("[A]s late as 1979, more than 80 percent of individuals who participated in a private retirement plan were in a defined-benefit plan," and such plans "held assets valued at roughly two and one-half times the value of assets held by * * * defined-contribution plans.") (citations omitted). Today, default risk has all but been eliminated because of ERISA. See Langbein, *supra*, at 1323. For example, "[a]ll defined benefit plans must pay a premium per covered participant into a fund administered by an ERISA-created government agency * * * which guarantees the payment of most benefits promised under defined benefit plans." *Id.* (footnote and citations omitted).

3. The use of fiduciary duties and civil remedies in ERISA to combat administration risk

In drafting ERISA, Congress chose to protect against administration risk by adopting a modified version of preexisting trust law. Langbein, *supra*, at 1324 ("[W]hen confronting abuse in plan administration, Congress was able to adapt the long-familiar trust model as the regulatory regime."). See also *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (noting that the duties imposed by ERISA on plan fiduciaries "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment") (citations omitted); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

The statute requires that virtually every employee benefit plan be structured as a trust. See 29 U.S.C. 1103(a). See also 26 U.S.C. 401(a) (2000 & Supp. IV 2004) (describing circumstances under which a "pension * * * shall constitute a qualified trust"). Section 403 of ERISA mandates that "all assets of an employee benefit plan shall be held in trust by one or more trustees [who, subject to limited exceptions] shall have exclusive authority and discretion to manage and control the assets of the plan." 29 U.S.C. 1003(a). Under this section, "the assets of a plan [subject to limited exceptions] shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1003(c)(1). Moreover, the statute groups those who oversee an ERISA trust under the rubric of "fiduciary" and provides an extremely broad definition of this term. See 29 U.S.C. 1002(21) (defining "fiduciary"). The breadth of this definition is quite significant because ERISA imposes many strict obligations on fiduciaries that, if violated, may give rise to personal liability.

a. The fiduciary duties imposed by ERISA

The primary fiduciary duties under the statute are derived from the common law of trusts. Section 404(a)(1)(A) codifies the common law trust principle of a duty of loyalty.

This provision states that "a fiduciary shall discharge his duties with respect to a plan * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries [and] defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). Section 404(a)(1)(B) of ERISA codifies the common law trust principle of a duty of care. This provision states that "a fiduciary shall discharge his duties with respect to a plan * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. 1104(a)(1)(B).

In addition to codifying these common law fiduciary duties in general terms, section 404 of ERISA also provides some specific examples of these duties in the plan management context. For example, section 404(a)(1)(C) specifically provides that a plan fiduciary must "diversify[] the investment of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). And section 404(a)(1)(D) specifically provides that a plan fiduciary must act "in accordance with the documents and instruments governing the plan" unless such documents are inconsistent with ERISA. 29 U.S.C. 1104(a)(1)(D).

b. Civil remedies for fiduciary breach

If a fiduciary breaches his duties under ERISA, he is subject to liability under section 409 of the statute. This section, entitled "Liability for breach of fiduciary duty," provides,

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made

> through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. 1109(a). The liability of a fiduciary described in section 409 must be enforced, however, through a civil action brought pursuant to section 502(a) of ERISA, entitled "Civil enforcement."[6]

Section 502(a)(2) is the primary provision designed to authorize litigation against a fiduciary to remedy a breach of fiduciary duty. It states that "[a] civil action may be brought * * * by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title. [*i.e.*, section 409 of ERISA]." 29 U.S.C. 1132(a)(2).

Section 502(a)(3) is the second provision in ERISA that authorizes litigation against a fiduciary to remedy a breach of duty. It provides that "[a] civil action may be brought * * * by a participant, beneficiary, or fiduciary * * * to enjoin

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[6] Judicial interpretation of section 502(a) is an extraordinarily important task. Section 502(a) sets forth the exclusive civil remedies that are available under the statute. See, *e.g., Russell,* 473 U.S. at 146; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). This fact, coupled with an extremely strong ERISA preemption doctrine, means that even an *uncontested* violation of ERISA will be tolerated unless section 502(a) provides a remedy. The following examples are illustrative:

In the pension plan context, see, *e.g., Farr v. U.S. West Commc'ns, Inc.* 151 F.3d 908 (CA9 1998) (acknowledging that plan fiduciaries violated their duties under ERISA by *knowingly* withholding information regarding material tax consequences but finding that the participants had no remedy because the amount of additional taxes incurred were legal damages and, thus, unavailable under any part of section 502(a)).

In the welfare plan context, see, *e.g., Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (CA5 1992) (dismissing lawsuit for wrongful death of unborn child even though employer denied hospitalization for woman who, according to both her personal physician and independent physician consulted by employer, required complete bedrest and around-the-clock monitoring, where fetus died while woman was at home without medical care).

any act or practice which violates any provision of this subchapter or the terms of the plan. 29 U.S.C. 1132(a)(3). It also permits such plaintiffs to seek "other appropriate equitable relief * * * to redress such violations or * * * to enforce any provisions of this subchapter or the terms of the plan." *Id.* As this Court has observed, section 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy.'" *Varity Corp. v. Howe,* 516 U.S. 489, 512 (1996). Unlike section 502(a)(2), which only permits recovery by an ERISA *plan* that is harmed by fiduciary misconduct, section 502(a)(3) authorizes both plan relief *and* individual relief to remedy fiduciary breach provided that the remedy sought qualifies as "equitable."[7]

As explained below, this case presents two important questions of statutory interpretation regarding the scope of sections 502(a)(2) and 502(a)(3) of ERISA.

B. Proceedings Below

On June 2, 2004, petitioner filed a civil action against respondents. Pet. App. 15a. In his complaint, petitioner alleged (1) that he is a participant in the DeWolff Plan,[8] (2) that respondent DeWolff committed fiduciary breach in violation of ERISA by failing to invest petitioner's interest in the plan as directed, and (3) that this fiduciary breach caused

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[7] Until 1996, there was a split among the circuits regarding the proper role of section 502(a)(3) in the context of claims of fiduciary breach. In *Varity,* this Court resolved the split by holding that a remedy for injuries caused by a breaching fiduciary may be obtained under section 502(a)(3) by an injured ERISA plan *as well as* by an injured participant or beneficiary. 516 U.S. at 509.

[8] Respondents recently filed a motion to dismiss the writ arguing that petitioner is no longer a "participant" in the DeWolff Plan. As explained in petitioner's opposition to that motion, respondents' claim is baseless and, in any event, is not properly before this Court. *Amici,* including most notably, the United States, agree with petitioner on this point. See U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 29 n.6; see also Law. Prof. Merits. Br. in Supp. of Pet. as *Amici Curiae,* pt. II.

petitioner's interest in the DeWolff Plan to be diminished by approximately $150,000. BIO App. 2a-4a. To redress this fiduciary breach, petitioner sought "'make whole' or other equitable relief as allowed by [section 502(a)(3) of ERISA]," as well as "such other and further relief as the court deems just and proper." *Id.* at 4a.

On February 2, 2005, respondents filed a motion for judgment on the pleadings claiming that the relief sought by petitioner for the alleged breach of fiduciary duty was not available under section 502(a) of ERISA. Pet. App. 16a. In opposing this motion, petitioner made clear precisely what remedy he sought. His opposition stated,

> Plaintiff does not wish for the court to award him any money, but he simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty. The court could accomplish the Plaintiff's desire * * * [by] *simply order[ing] the Defendants to reimburse to the plan amounts necessary so that Plaintiff's interest in the plan is what it should have been, but for the breach of fiduciary duty.* Such an order would be nothing more than a classic situation where the plan is being made whole.

BIO. App. 50a (emphasis added).[9]

On June 23, 2005, the district court granted respondents' motion for judgment on the pleadings. Pet. App. 15a-21a. On June 19, 2006, the Fourth Circuit affirmed. *Id.* at 1a-14a. In its opinion, the court of appeals summarized its resolution of the two questions presented as follows:

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[9] As petitioner made clear in this filing with the district court, restoration of losses to the plan unquestionably falls within the relief sought in his complaint. BIO App. 51a (noting the complaint's disjunctive reference to "'make whole' *or* other equitable relief pursuant to E.R.I.S.A." (emphasis added)); see also Pet. App. 4a (requesting "such other and further relief as the court deems just and proper").

> The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of * * * ERISA, 29 U.S.C. 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated[10] had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.
>
> We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 28 (1993) and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here.

Pet. App. 2a.

Petitioner timely sought rehearing and rehearing *en banc*. The United States Department of Labor filed a brief *amicus curiae* in support. On August 8, 2006, the Fourth Circuit issued an order in which it rejected the arguments presented by the United States Department of Labor and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a. On June 18, 2007, this Court granted a writ of certiorari to resolve both of the legal questions decided by the court of appeals.

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[10] The claim that petitioner sought "the amount by which his account would have appreciated" is, although irrelevant, not a proper characterization of petitioner's complaint. BIO App. 3a-4a (alleging that "Plaintiff's interest in the plan has been *depleted*") (emphasis added).

SUMMARY OF ARGUMENT

At its core, this case presents one broad question. Can an individual whose 401(k) account balance is depleted by fiduciary misconduct recover the monetary losses under ERISA? The court of appeals answered this question in the negative. It was wrong. The recovery of such losses is available under both section 502(a)(2) and section 502(a)(3) of the statute.[11]

I. The interpretation of section 502(a)(2) of ERISA advanced by petitioner is a straightforward application of the relevant statutory text.

A. Sections 502(a)(2) and 409 of ERISA authorize a participant in a pension plan to sue a fiduciary to recover "*any* losses to the plan" resulting from each breach of "*any* of the * * * duties imposed upon fiduciaries" by the statute. 29 U.S.C. 1132(a)(2); 1109(a) (emphases added). In this case, petitioner has alleged that respondents, acting in a fiduciary capacity, failed to properly invest the assets allocated to his 401(k) plan account thereby causing it to diminish in value by approximately $150,000. Because the assets of a 401(k) plan are, by definition, allocated to the individual accounts of its participants, any losses to such a plan must *necessarily* result in a loss to one or more of the individual accounts within the plan. This does not change their character, however, as "losses to the plan." Section 502(a)(2) is a vehicle designed to permit individuals to restore such losses *first* to

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[11] Two briefs *amici curiae* filed with this Court present arguments as to why this Court's past interpretation of sections 502(a)(2) and 502(a)(3) may warrant reconsideration. See Pension Rights Center Amicus Br. in Supp. of Pet. as *Amicus Curiae* (arguing that this Court should reconsider its past interpretation of section 502(a)(2)); National Employment Lawyers' Assoc. Br. in Supp. of Pet. as *Amicus* Curiae (arguing that this Court should reconsider its past interpretation of section 502(a)(3)). Although there may be good reason to do so, no such reconsideration is required in order for petitioner to prevail in this case. The relief sought by petitioner is available under sections 502(a)(2) and 502(a)(3) of ERISA *as currently written and interpreted by this Court.*

the plan so that *then* the plan can allocate them to the affected participant(s)' individual plan account.

B. In rejecting petitioner's contention that he has sought to restore losses to the DeWolff Plan, the court of appeals relied on two untenable theories. First, the court reasoned that section 502(a)(2) of ERISA does not permit the recovery of losses that will only benefit a single participant in a 401(k) plan. Nowhere, however, does the text of ERISA require, suggest, or imply that a decline in the value of plan assets resulting from a fiduciary breach must affect more than one individual account holder to qualify as recoverable "plan losses." In fact, it says precisely the opposite. Second, the court of appeals reasoned that section 502(a)(2) does not permit the recovery of losses that result from the breach of a fiduciary duty owed solely to a single participant. The plain text of sections 502(a)(2) and 409, however, authorize a remedy for the breach of "*any* of the * * * duties imposed upon fiduciaries" by ERISA. And, in any event, the duties breached by respondents were owed to the entire DeWolff Plan.

C. Unable to provide a meaningful textual basis for its interpretation of sections 502(a)(2) and 409, the court of appeals instead purported to base its holding on language from this Court's opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). Neither the holding of nor *dicta* in that case, however, provides any support for the Fourth Circuit's cramped interpretation of the statute. *Russell's* holding did not address what qualifies as "any losses the plan" under section 409 of ERISA because the plaintiff in that case expressly acknowledged that she was not seeking any relief on behalf of the plan. And, the *dicta* in *Russell* confirms that the restoration of funds sought by petitioner here falls squarely within the Court's conception of what relief is available under sections 502(a)(2) and 409 of the statute.

II. If this Court determines that petitioner is not authorized to seek the restoration of his 401(k) account losses

under section 502(a)(2) of ERISA, it should interpret the scope of "equitable relief" under section 502(a)(3) of the statute so as to authorize the relief that petitioner seeks. Such an interpretation of section 502(a)(3) is a faithful application of this Court's past holdings regarding the scope of relief encompassed by the phrase "equitable relief."

A. Section 502(a)(3) of ERISA authorizes a pension plan participant to seek "appropriate equitable relief" to redress violations of ERISA including the breach of fiduciary duty. 29 U.S.C. 1132(a)(3). The scope of the phrase "equitable relief" has been interpreted by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 1869 (2006). In this line of cases, the Court has established a two-part test to determine whether a plaintiff is seeking "equitable relief" under 502(a)(3). First, the basis for the plaintiff's claim must be equitable. Second, the remedy sought by the plaintiff must have been typically available in pre-merger courts of equity under the circumstances present in the case at bar.

B. The relief sought by petitioner in this case satisfies this Court's two-part test. Petitioner is seeking the restoration of specific monetary losses to his 401(k) account that were caused by respondents' breach of fiduciary duty. Such relief is perfectly analogous to the historical remedy of "surcharge" which was regularly awarded by pre-merger courts of equity as a remedy for breaches of trust in the precise circumstances present in this case. Although it may superficially appear to resemble compensatory damages, the remedy of surcharge is distinctly equitable in nature. It has a different purpose from legal damages; it has specific conditions that govern its application. And is no more "compensatory" than other remedies that this Court has already deemed to qualify as "equitable relief" under section 502(a)(3).

ARGUMENT

I. PETITIONER HAS REQUESTED RELIEF THAT IS AVAILABLE UNDER SECTION 502(A)(2) OF ERISA

In affirming the district court's grant of respondents' motion for judgment on the pleadings, the Fourth Circuit decided that petitioner failed to seek any relief that is available under ERISA. See generally Pet. App. 1a-14a. In so doing, the court of appeals explicitly rejected petitioner's contention that he was seeking to restore losses to the DeWolff Plan that were caused by respondents' alleged breach of fiduciary duty as authorized by sections 502(a)(2) and 409(a) of ERISA. *Id.* at 5a-7a, 24a-28a. As explained below, the Fourth Circuit erred.

A. Sections 502(a)(2) and 409 Authorize Petitioner to Seek Restoration of Plan Losses Regardless of Whether Such Losses Are Attributable to His Individual Account

Section 502(a)(2) of ERISA authorizes a participant in a pension plan to bring suit for "appropriate relief" under section 409 of the statute. 29 U.S.C. 1132(a)(2). Section 409(a), in turn, provides that

> any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan *any losses to the plan* resulting from each such breach.

29 U.S.C. 1109(a) (emphasis added).

There is no dispute in this case that petitioner has sought repayment to the DeWolff Plan of investment losses to his 401(k) plan account that were allegedly caused by respondents' fiduciary breach. See, *e.g.*, BIO App. 1a-5a, 50a. Nonetheless, the court of appeals held that petitioner was not seeking relief authorized by sections 502(a)(2) and 409(a) of ERISA because, in its view, the monies that petitioner sought to restore did not qualify as "losses *to the plan*." Pet. App. 24a ("To adopt the Secretary's view, however, would

necessarily transform every purely individual claim for breach of fiduciary duty into a 'plan loss.'"); *id.* at 27a (characterizing the government's "view of the term 'losses to the plan'" as "overly broad"). As explained below, the Fourth Circuit's conception of "plan losses" fundamentally misunderstands the nature of an individual account plan and, in so doing, disregards the plain text of ERISA.

1. Assets that are allocated to an individual 401(k) account remain plan assets

No one would seriously dispute that the term "any losses to the plan" includes any decrease in the total value of that plan's assets. In order to assess whether there has been a diminution in the total value of a particular plan's assets, however, it is first necessary to understand what comprises the assets of that plan. As noted above, this case involves a 401(k) plan—the most common type of what ERISA refers to as an individual account plan. See 29 U.S.C. 1002(34) (defining the term individual account plan). See also BIO App. 12a.

In any individual account plan, the plan's assets consist entirely of contributions to the plan as well as any interest or gains generated from such contributions. 29 U.S.C. 1002(34). By statutory design, all contributions made to an individual account plan must be allocated to one or more individual accounts within the plan that are set up for the benefit of each of the plan's participants. *Id.* "[C]ontributions are made to a single funding vehicle, usually a trust" and "as amounts are contributed to the trust, they are allocated to the participant's account." *See* David A. Littell et al., *Retirement Savings Plans: Design, Regulation, and Administration of Cash or Deferred Arrangement* 6 (1993).[12] "[T]he sum of all the account balances [allocated

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[12] The DeWolff Plan is no exception. Its summary plan description unambiguously states that "[a]ll money that is contributed to the Plan is held in a trust fund." BIO App. 42a. The document further provides that

to the various individual plan accounts] equals the total market value of the plan's assets." Dan M. McGill et al., *Fundamentals of Private Pensions* 247 (7th ed. 1996).

The "allocation" of plan assets to a participant's individual account within the plan, however, does not transfer the ownership of such assets from the plan to that participant. To the contrary, allocated assets are owned and controlled by the plan until the moment they are withdrawn from the plan by a participant or beneficiary.[13] Indeed, any alternative arrangement would cause a 401(k) plan to lose its tax preferred status under section 401 of the Internal Revenue Code. See Rev. Rul. 89-52, 1989-1 C.B. 110 ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will."). This ownership structure is not a mere formality, devoid of any real-world significance. To the contrary, the plan's control over the assets is an essential substantive feature of such plans. For example, a portion of the assets "allocated" to each individual account is customarily used to pay the costs necessary to operate the plan. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003)

"[t]he Trustee [*i.e.*, DeWolff] is responsible for the safekeeping of the trust fund" and that "[t]he trust fund * * * will be the funding medium used for the accumulation of assets from which benefits will be distributed." *Id.*

[13] Unlike a withdrawal from the plan, the "allocation" of plan assets to a participant's individual plan account does not involve a physical transfer *of any kind*. 1 Michael J. Canan, *Qualified Retirement Plans* § 3:5 (2007) (although "employer contribution[s are] credited to separate accounts for each employee, the trustee invests all of the funds in one certificate of deposit"). The "allocation" is nothing more than a bookkeeping entry used to keep track of each participant's ratable beneficial interest in the *plan's* assets.

<http://www.dol.gov/ebsa/regs/fab_2003-3.html> (discussing appropriate methods of allocating such expenses).

2. The diminution in a defined contribution plan's total assets may result from a loss to one 401(k) plan account

Because the assets of an individual account plan are, by definition, allocated to the accounts of its participants, any losses to such a plan must *necessarily* result in a loss to one or more of the individual accounts within the plan. In most cases, however, these plan losses will not impact every participant in the plan because the participants in an individual account plan have a beneficial interest in *particular* plan assets. See, *e.g.*, Rev. Rul. 02-45, 2004-1 C.B. 971 (noting, for tax purposes, that losses restored to a defined contribution plan must then be "allocated among the individual accounts of the participants and beneficiaries in proportion to each account's investment in [the asset that caused the loss]").

Whether, and how severely, any given participant in an individual account plan is affected by plan losses will depend upon which plan assets are depleted. Consider the following example: a pension plan fiduciary offers multiple investment options (*e.g.*, different mutual funds) to the participants in his plan. One of these mutual funds (Fund X) is nothing more than a personal bank account of the fiduciary that he uses to illegally divert pension funds for his own personal use. If any of the participants in this plan choose to invest in Fund X, the plan will suffer losses. If every participant in the plan invests in Fund X, then *every* participant will feel the effect of the plan's losses. If half of the participants in the plan invest in Fund X, then *half* of the participants will feel the effect of the plan's losses. And if only a single participant is unfortunate enough to invest in Fund X, then only that *one* participant will feel the effect of the plan's losses. Regardless of the number of participants affected, however, the plan will suffer losses in each of these examples because assets of the plan will have been depleted.

Petitioner's case is no different. He has alleged that respondents, acting in a fiduciary capacity, failed to invest the assets allocated to his plan account in accordance with his instructions and, as a result of that fiduciary breach, his plan account holds approximately $150,000 less than it would otherwise have held. In seeking restoration of these funds to the DeWolff Plan, petitioner has properly sought to restore "losses to the plan." 29 U.S.C. 1109(a). The fact that these plan losses, when recovered, will principally (or even exclusively) be allocated to petitioner's individual plan account is of no moment.[14] As one court of appeals recently observed, "ERISA entitles individual-account-plan participants not only to what *is* in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations." *Graden v. Conexant Sys. Inc.*, No. 06-2337, 2007 WL 2177170, at *3 (CA3 July 31, 2007). Section 502(a)(2) of the statute is the vehicle through which any losses may *first* be restored to the plan and *then* allocated to the affected participant's individual account.

B. The Fourth Circuit's Reading of 502(a)(2) and 409 Is Untenable

The Fourth Circuit admitted that "the recovery plaintiff seeks could be seen as accruing to the plan in [what it characterized as] the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan." Pet. App. 6a (emphasis added). Nonetheless, the court of appeals concluded that petitioner was not seeking to recover "losses *to the plan*." The court advanced two untenable

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[14] Should petitioner ultimately prevail in this lawsuit and obtain a restoration of funds to the DeWolff Plan, respondents will undoubtedly be required under ERISA to allocate some—if not most—of these restored funds to the individual account of petitioner. See Law. Prof. Merits Br. in Supp. of Pet. as *Amici Curiae*, pt. I (explaining that ERISA's prudence requirement will obligate respondents to allocate some, if not most, of any restored funds in this case to the 401(k) plan account of petitioner once legitimate plan expenses have been deducted).

theories in support of its rejection of the plain meaning of the statute.

1. The Fourth Circuit's "individual benefit" theory is untenable

In the eyes of the Fourth Circuit, "[i]t is difficult to characterize the remedy plaintiff seeks as anything other than personal" because "[h]e desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit." Pet. App. 6a. Thus, the court of appeals concluded that petitioner has not sought to recover "losses *to the plan*" because "[t]he measure of [his desired] recovery is a loss suffered by him alone." *Id.* Such an interpretation of sections 502(a)(2) and 409 of ERISA is nothing more than a wholesale rejection of the plain meaning of the statute.[15]

Nowhere does the text of ERISA require, suggest, or imply that a decline in the value of plan assets flowing from fiduciary breach must affect more than one individual account holder to qualify as recoverable "plan losses." In fact, it says precisely the opposite: section 502(a)(2) authorizes recovery of "*any* losses to the plan," whether those losses are felt by one individual account, several individual accounts, or every individual account in the plan. As explained in Part I.A., *supra*, all are necessarily losses to the plan. In essence, the court of appeals decided that section 502(a)(2) requires a plaintiff to demonstrate *not only* (1) a loss to the plan *but also* (2) that the loss affected a class of plan participants, rather than just one plan participant. See Pet. App. 6a (contrasting the suit filed by petitioner with what the court considered to be a permissible "[section 502](a)(2) ac-

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[15] As explained in several briefs *amici curiae* filed with this Court, the Fourth Circuit's "individual benefit" theory also contravenes the very purpose behind sections 502(a)(2) and 409 of ERISA. See, *e.g.*, Self Ins. Inst. of Amer. Br. in Supp. of Pet. as *Amicus Curiae*, pt. II (arguing at length that the Fourth Circuit's rule will "fundamentally undermine ERISA").

tion in which an individual plaintiff sues on behalf of * * * a class of similarly situated participants").

Tellingly, the Fourth Circuit cited no text in ERISA that could possibly be read to prohibit suit by one plan participant yet authorize suit by a class of such participants. That is because no such language exists. Instead, the court of appeals, impermissibly wielding Congress's quill, simply rewrote section 502(a)(2) to authorize recovery for "any losses to the plan, but only if such losses affect some unspecified number of plan participants that is greater than one." This revision of ERISA's plain text eschews the designedly simple standard of "*any* losses to the *plan*" in favor of a nebulous, fact-based inquiry into whether "enough" plan *participants* were affected by the losses. Furthermore, such an approach leaves unanswered a host of practical questions: is a subclass of two participants enough? Is it the number (*e.g.*, more than ten) or percentage (*e.g.*, more than 50%) of participants affected that triggers a section 502(a)(2) claim? Is the amount or percentage of plan assets involved a relevant factor that a court may consider? If the Fourth Circuit is correct, then one must ask: how did Congress want courts to answer such questions and what guidance did it provide to do so?

ERISA itself gives Congress's answer. None of those questions matters. Not one line in the extensive and reticulated text of ERISA suggests that the meaning of "any losses to the plan" turns on how many plan participants were hurt or what percentage of assets were lost. Were such questions relevant, Congress would surely have supplied some guidance or standards. Yet it did not, choosing instead the simple expedient of unqualified text—"*any* losses to the plan." 29 U.S.C. 1109(a) (emphasis added).[16]

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[16] As noted by the United States, the expansive meaning of the word "any" is well recognized by this Court. See U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 8 (citing *HUD v. Rucker*, 535 U.S. 125, 131 (2002)).

2. The Fourth Circuit's "individual duty" theory is untenable

The court of appeals also expressed its belief that the investment losses at issue in this case "allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him." Pet. App. 6a. This assertion of an "individual duty" is both irrelevant and inaccurate. It is irrelevant because, as the United States noted at the petition stage, "[s]ections 502(a)(2) and 409 provide a remedy for the breach of '*any* of the responsibilities, obligations, or duties imposed upon fiduciaries' by ERISA." U.S. Invitation Brief at 7 (citing 29 U.S.C. 1109(a) (emphasis in original). Put simply, there is nothing in the text of ERISA to suggest that only *certain* fiduciary breaches entitle a participant to seek restoration of plan losses pursuant to sections 502(a)(2) and 409.

It is also inaccurate because the obligation to follow the investment instructions of a participant is a fiduciary duty owed *to the plan.* See Law Prof. Merits Br. in Supp. of Pet. as *Amici Curiae*, pt. I.A. (explaining why "a breach of a fiduciary duty owed to an individual account holder may well constitute a breach of duty owed to the plan itself"). The Fourth Circuit's alternative view is fundamentally at odds with both the text and purpose of the statute. If the court of appeals' conception of "individual duty" properly reflected the fiduciary rules embodied in ERISA, then section 502(a)(2) would not permit the recovery of plan assets in a host of settings where such assets have unquestionably been depleted by fiduciary misconduct. For example, a fiduciary could (1) sell, exchange, or lease property *of the plan* in violation of 29 U.S.C. 1106(a)(1)(A) provided that this property has been allocated to only one participant; (2) lend money *of the plan* in violation of 29 U.S.C. 1106(a)(1)(B) provided that this money has been allocated to only one participant's account; or (3) transfer assets *of the plan* in violation of 29 U.S.C. 1106(a)(1)(D) provided that these assets have been allocated to only one participant's account. Similarly, a fidu-

ciary could violate his duties under section 404(a)(1)(B) of ERISA by providing negligent financial advice so long as it was only provided to one participant. See, *e.g.*, 29 C.F.R. 2509.96-1 (interpreting the definition of "fiduciary" in 29 U.S.C. 1002(21) to include someone who provides investment advice for a fee to any participant). And perhaps worst of all, a fiduciary could violate his duties under section 404(a)(1)(A) of ERISA by looting plan assets as long as the fiduciary restricts the theft to monies that have been allocated to a single participant in the plan. As these examples illustrate, the Fourth Circuit's conception of an "individual duty" cannot sensibly be reconciled with sections 502(a)(2) and 409 of the statute.

C. *Russell* Cannot Support the Fourth Circuit's Reading of 502(a)(2) and 409

Unable to provide a meaningful textual basis for its interpretation of sections 502(a)(2) and 409 of ERISA, the court of appeals instead purported to base its holding on language from this Court's opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). As explained below, however, neither the holding of nor *dicta* in *Russell* provide any support for the Fourth Circuit's cramped interpretation of the statute.

1. *Russell's* holding did not address what qualifies as "any losses to the plan"

Russell involved an individual plaintiff, Doris Russell, who was a beneficiary of two ERISA welfare plans (collectively, "the plan"). *Russell*, 473 U.S. at 136. Ms. Russell became disabled and received plan benefits until a disability committee determined that she was no longer eligible. *Id.* After several months and further review, Ms. Russell's benefits were reinstated and she received full payment of all retroactive benefits to which she was entitled under the plan. *Id.* at 136-137. At this point, she filed a lawsuit in which she alleged, *inter alia*, that the delay in paying her

disability benefits was a fiduciary breach in violation of ERISA. *Id.* at 137.[17]

As a remedy for this alleged fiduciary breach, Ms. Russell sought monetary relief under sections 502(a)(2) and 409(a) of ERISA. *Id.* at 140. Unlike petitioner in this case, however, Ms. Russell did not seek to recover "any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). Indeed, Ms. Russell explicitly acknowledged that she was not seeking any relief on behalf of the plan. See, *e.g., Russell*, 473 U.S. at 145-148. To the contrary, she sought pain and suffering as well as punitive damages payable directly to her as compensation for the delay in her receipt of disability benefit payments. *Id.* at 137-38. In support of this position, Ms. Russell argued that section 409 of ERISA obligates a breaching fiduciary to directly compensate a participant for individual injuries that occurred entirely outside of the plan. *Id.* at 139-148. See also Brief for the Respondent in *Massachusetts Mut. Life Ins. Co. v. Russell*, O.T. 1984, No. 84-9, 1984 WL 566097, *12-13 (hereinafter "*Russell* Resp. Br.") (arguing that "[p]articipants may recover damages on their own behalf for breaches of fiduciary duty under Section 1109" because [n]owhere in the language of Section 1109 or Section 1132 or the legislative history of ERISA is it specified that only the plan can recover under Section 1109").

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[17] It is significant that *Russell* involved a welfare plan. In the welfare plan context, fiduciary breach often does *not* involve the mismanagement or theft of plan assets. Instead, the typical allegation of fiduciary breach is brought by a participant or beneficiary (like Ms. Russell) who disputes the plan's refusal to pay certain plan benefits. In such situations, the resulting harm to a plan participant or beneficiary does not involve the loss of any plan assets. Section 502(a)(1) of ERISA was specifically enacted by Congress to permit the recovery of plan benefits by a participant or beneficiary. 29 U.S.C. 1132(a)(1). Ms. Russell did not proceed under 502(a)(1) only because she had already received all plan benefits to which she was entitled. *Russell*, 473 U.S. at 136.

Ms. Russell advanced two distinct arguments in support of her interpretation of section 409. Her primary argument was that the phrase "such other equitable or remedial relief as the court may deem appropriate" authorized individual relief because it does not specifically state that such relief must be obtained on behalf of the plan. *Russell*, 473 U.S. at 139-44.[18] In the words of her attorney:

> If you look at the language of Section 409, it doesn't say only the plan may collect against the fiduciary. Clause one says to the plan, clause two says to the plan, but when you get to clause three, which is the "such other equitable or remedial relief as the court deems appropriate," there is no qualifier, to the plan.

Transcript of (Second) Oral Argument in *Massachusetts Mut. Life Ins. Co. v. Russell*, O.T. 1984, No. 84-9 (Apr. 24, 1985), 1985 U.S. Trans Lexis 57. Alternatively, Ms. Russell argued that "a private right of action for participants and beneficiaries could be read into Section 1109." *Russell* Resp. Br., *supra*, at *14. See also *Russell*, 473 U.S. at 145.

This Court rejected both arguments. *Id.* at 148 ("Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extracontractual damages caused by improper or untimely processing of benefit claims."). Because the only issue presented in *Russell* was whether section 409 of ERISA authorized non-plan

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[18] As noted above, section 409(a) of ERISA imposes personal liability on a breaching fiduciary. The statutory text divides the categories of personal liability into three distinct clauses. The first clause mandates the restoration of any plan losses "*to such plan*." 29 U.S.C. 1109(a) (emphasis added). The second clause mandates the restoration of any profits "*to such plan*." *Id.* (emphasis added). The third clause is a discretionary provision that authorizes "such other equitable or remedial relief as the court may deem appropriate including removal of such fiduciary." *Id.*

relief, there was no occasion for this Court to address what qualifies as "any losses to the plan."[19] As such, the holding in *Russell* cannot resolve whether the relief sought by petitioner in this case satisfies section 409 and is, thus, available under section 502(a)(2).

2. *Russell's dicta* reinforces the plain meaning of "any losses to the plan"

Despite the fact that the holding of *Russell* did not address what constitutes "any losses to the plan" under section 409 of ERISA, the Fourth Circuit relied almost entirely on *dicta* from *Russell* to justify its rejection of the plain meaning of this statutory phrase. Pet. App. 5a, 6a, 24a. Of course, it is well settled that *dicta* is no substitute for a proper analysis of statutory text. See, *e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as through they were the United States Code."). In any event, the language from *Russell* was taken out of context, and as such, does nothing to support the Fourth Circuit's cramped interpretation. Indeed, a proper reading of *Russell* only serves to reinforce the conclusion that petitioner's lawsuit is precisely the type of civil action that was contemplated by Congress in enacting sections 502(a)(2) and 409 of ERISA.

The *Russell* Court was interpreting the third clause in section 409 which authorizes "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. 1109(a). It was in this context that *Russell* made the statements quoted by the court of appeals including phrases such as "plan as a whole" and "protect the entire plan." Because

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[19] As the opening sentence of the Court's opinion makes clear, the only question presented in *Russell* was whether "a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims." *Russell*, 473 U.S. at 136.

the third clause of section 409 is a catchall provision, it necessarily applies only if the relief sought by the plaintiff is not specifically authorized by one of the first two clauses. In other words, *Russell* required this Court to announce a standard for evaluating when a claim that does *not* seek "losses to the plan" or "profits of [a] fiduciary" *nonetheless* might constitute "appropriate" relief under section 409. It was in this context that this Court employed such phrases as "plan as a whole" and "protect the entire plan." As such, it is quite clear that *Russell* did not intend these phrases to *supplement* the meaning of the phrase "any losses to the plan" but rather to *describe* it. Put simply, the Court presumed—and correctly so—that the restoration of "*any* losses to the plan" (*i.e.*, the restoration of *any* diminution of plan assets) *necessarily* "inures to the benefit of the plan as a whole" and "protect[s] the entire plan."

Even a cursory examination of the complete opinion in *Russell* confirms that the restoration of funds sought by petitioner falls squarely within the Court's conception of what relief is available under sections 502(a)(2) and 409 of ERISA. The following examples are illustrative. In properly characterizing Ms. Russell's claim for pain and suffering damages as "individual," the Court noted that "the principal statutory duties imposed [by ERISA] on the trustees relate to the proper management, administration, and investment of fund assets." *Russell*, 473 U.S. at 142. These are the very statutory duties that petitioner alleges were violated by respondents in this case. In discussing the legislative history of section 409, the Court noted that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Id.* Such mismanagement of plan assets is the precise subject of this case. Even the language from *Russell* that was relied upon by the court of appeals focuses on the fact that that section 409 is "primarily concerned with the possible misuse of *plan assets*." As explained in Part I., *supra*, there can be no doubt that the

funds which petitioner is attempting to restore to the DeWolff Plan are just that: *plan assets*.

In sum, petitioner has properly sought the restoration of losses to the DeWolff Plan as authorized by sections 502(a)(2) and 409 of ERISA. The Fourth Circuit's contrary conclusion is based on a gross misinterpretation of both the plain text of the statute and this Court's decision in *Russell*. As such, reversal is warranted.

II. PETITIONER HAS REQUESTED RELIEF THAT IS AVAILABLE UNDER SECTION 502(A)(3) OF ERISA

If this Court determines that petitioner is not authorized to seek the restoration of investment losses under section 502(a)(2) of ERISA, it should interpret the scope of "equitable relief" in section 502(a)(3) of the statute so as to authorize the relief that petitioner seeks.[20] *Varity*, 516 U.S. at 513 ("It is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy."). As explained below, a lawsuit to recover monetary losses from a fiduciary whose breach has caused such losses seeks "equitable relief" under section 502(a)(3) as the term has been interpreted by this Court.

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[20] Section 502(a)(3) of ERISA "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy." *Varity*, 516 U.S. at 512. Even if petitioner *prevails* on the 502(a)(2) Question Presented, however, he respectfully requests that the Court adjudicate the 502(a)(3) Question Presented. It is unclear at this stage of the proceedings whether the ultimate scope of relief that will be available to petitioner is more extensive under section 502(a)(3) than under section 502(a)(2). Because petitioner believes that he has properly requested relief that satisfies *both* section 502(a)(2) and section 502(a)(3), he asks that this Court decide both questions presented so that that he can proceed under the latter section, if necessary, on remand.

A. Monetary Relief Is Available Under Section 502(a)(3) If It Was "Typically Available in Equity"

Section 502(a)(3) of ERISA authorizes participants and beneficiaries to bring a civil action to enjoin any act which violates ERISA or "to obtain other appropriate equitable relief" to enforce any provisions of the statute. 29 U.S.C. 1132(a)(3). For well over a decade, there has been continued judicial confusion over when a claim for monetary relief constitutes "equitable relief" under section 502(a)(3) of the statute. This Court first addressed the issue in 1993. See *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). In *Mertens*, the beneficiaries of an ERISA plan sought monetary compensation from a third party who allegedly participated in the plan fiduciaries' breach. Although "[m]oney damages are, of course, the classic form of *legal* relief," *id.* at 255, the beneficiaries—joined by the United States as *amicus curiae*—argued that they sought "equitable relief" under section 502(a)(3) because, "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* (citations omitted). In other words:

> "[A]lthough a beneficiary's action to recover losses resulting from a breach of duty superficially resembles an action at law for damages," the Solicitor General suggest[ed that], "such relief traditionally has been obtained in courts of equity" and therefore, "is, by definition, 'equitable relief.'"

Id. (quoting Brief for United States as *Amicus Curiae* 13-14).

A deeply-divided Court rejected this argument. *Id.* at 257 ("Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*.") (emphasis in original). Instead, the Court held that the phrase "equitable relief" was intended by Congress to limit the remedies available under section 502(a)(3) to "those categories of relief

that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256 (emphasis in original).[21]

In the years that followed, many ERISA plaintiffs attempted to seek monetary awards under section 502(a)(3) by characterizing the relief they sought as a remedy that would qualify as "typically available in equity" under *Mertens* (*e.g.*, restitution). A circuit split developed and, in 2002, this Court again addressed the circumstances under which monetary relief was available under section 502(a)(3). *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

In *Knudson*, the fiduciary of an ERISA welfare plan sought monetary reimbursement from a plan beneficiary of medical expenses that had been advanced on her behalf. Although the basis for this reimbursement claim was the plan contract itself, the fiduciary argued that it was not seeking the legal remedy of compensatory damages for breach of contract. Instead, the fiduciary maintained that its lawsuit was authorized by section 502(a)(3) because it sought to enforce its monetary reimbursement claim by requesting two categories of relief (injunction and restitution) that were explicitly identified in *Mertens* as "typically available in equity." *Id.* at 210-218. First, the Court affirmed the core holding of *Mertens* that "equitable relief" was intended by Congress to limit the remedies available under section 502(a)(3) to "those categories of relief that were typically available in equity." *Id.* at 209-210. Second, the Court's narrow majority went on to announce a standard by which lower courts could judge whether relief in a particular case would qualify as "typically available in equity." According to

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[21] It is now clear that the list of equitable remedies provided by the Court in *Mertens* was intended to be illustrative, not exhaustive. See, *e.g., Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) (recognizing the remedy of equitable lien by contractual agreement as "typically available in equity").

the Court, the *Mertens* test is satisfied only if both (1) the basis for the plaintiff's claim is equitable, and (2) the remedy sought was typically available in pre-merger courts of equity under the circumstances present in the case at bar. *Id.* at 213.

The two-part test articulated in *Knudson* was recently reaffirmed by this Court in *Sereboff, supra.* In *Sereboff,* this Court held that a plan could enforce its contractual reimbursement provision under section 502(a)(3) by means of "an equitable lien established by agreement" against funds that had been received by a plan participant and beneficiary as part of a personal injury settlement. 126 S. Ct. at 1873-77. In ruling that the remedy sought was "equitable relief" under section 502(a)(3), the Court determined that both the basis for the plaintiff's claim and the precise remedy sought would have been considered equitable in the days of the divided bench. *Id.*

B. The Relief Sought by Petitioner Was "Typically Available in Equity" and Known as Surcharge

As explained above, a plaintiff seeks "equitable relief" under section 502(a)(3) of ERISA if (1) the basis of his claim is equitable and (2) the remedy he seeks was typically available in pre-merger courts of equity under the circumstances of the plaintiff's case. For the reasons that follow, the relief sought by petitioner here satisfies both prongs of this test.

1. The basis of petitioner's claim is equitable

This Court has made clear that a plaintiff seeking to avail himself of 502(a)(3) must first establish that "the basis for his claim is equitable." See *Sereboff,* 126 S. Ct. at 1874 (citing *Knudson,* 534 U.S. at 213). In *Sereboff,* this Court determined "the basis for [the plaintiff's] claim" by consulting its "case law from the days of the divided bench." *Id.* at 6. In concluding that "the basis for [the plaintiff's] claim" was equitable, this Court relied on "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he

gets a title to the thing." *Id.* at 6 (citing *Barnes v. Alexander*, 232 U.S. 117 (1914)). In essence, what *Sereboff* held is that "the basis for [the plaintiff's] claim" was equitable because the claim was viewed as such in pre-merger days. There can be no doubt that petitioner's breach of fiduciary duty claim in this case satisfies this standard. See, *e.g., Williams Electronics Games, Inc. v. Garrity*, 366 F.3d 569, 577 (CA7 2004) (noting that fiduciary obligations were an invention of the English chancery court").[22]

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[22] It is admittedly difficult to understand how the *Sereboff* inquiry into whether "the basis for [the plaintiff's] claim" is equitable is distinct from the inquiry into whether "the nature of the underlying remedies sought [by the plaintiff]" is equitable. *Cf. Knudson*, 534 U.S. at 224 (Ginsburg, J., dissenting) ("The Court purports to resolve this case by determining the 'nature of the relief' Great-West seeks. The opinion's analysis, h wever, trains on the question, deemed subsidiary, whether the disputed claim could have been brought in an equity court '[i]n the days of the divided bench.'") (citations omitted).

To be sure: one might suggest that *Sereboff* stands for the proposition that "the basis for [the plaintiff's] claim" was equitable because it was restitionary. Such a view, however, cannot be squared with the Court's actual holding. *Sereboff* did not authorize an equitable lien of the *restitutionary* variety. Rather, *Sereboff* authorized the plaintiff to proceed under section 502(a)(3) by seeking an equitable lien *by agreement*. As explained by the Sereboffs in their briefs filed with this Court, an equitable lien by agreement is a contractual remedy that is "equitable" only because it was awarded by a pre-merger court of equity when there was a technical impediment which prevented the plaintiff from proceeding in a suit at law. The remedy is *not* predicated on a showing of unjust enrichment. See Brief for the Petitioner in *Sereboff v. Mid Atl. Med. Servs., Inc.* at 24-25, O.T. 2005, No. 05-260, 2006 WL 165865 (discussing Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 601 (2d ed. 1993)). This distinction was explicitly recognized by the *Sereboff* Court. *Sereboff*, 126 S. Ct. at 1875 (noting that "an equitable lien sought as a matter of restitution, and an equitable lien 'by agreement,' of the sort at issue in *Barnes*, were different species of relief.").

If *Sereboff* held that "the basis for [the plaintiff's] claim" was equitable because it was restitionary, however, then the Court necessarily *presumed* that the Sereboffs were unjustly enriched by the tort settlement they had received. The fact that the Sereboffs had received an "identifiable" sum of money (although relevant to the question of *remedy*) has

As in *Knudson* and *Sereboff*, the availability of section 502(a)(3) turns on whether the *remedy* sought (here, "surcharge") was typically available in pre-merger courts of equity under analogous circumstances to those of this case.

2. Pre-merger equity courts typically awarded surcharge under the circumstances of this case

The remedy of surcharge was typically awarded by pre-merger courts of equity. *Manhattan Bank v. Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for breach of trust."); *Princess Lida of Thurns & Taxis v. Thompson*, 305 U.S. 456, 458, 464 (1939) (describing authority of state court, in a "suit in equity," "to surcharge [a trustee] with losses incurred"); 4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 (5th ed. 1941); John Adams, Jun., *The Doctrine of Equity; Being a Commentary on the Law as Administered by the Court of Chancery* 93 (1850); 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 1266-78, at 519-534 (12th ed. 1877); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 199.3, at 206 (4th ed. 1987). Moreover, this case presents a paradigmatic example of a situation in which surcharge would have been awarded by a pre-merger court of equity—a case in which a fiduciary's purchase of improper investments has caused a loss. 2 Story, *supra*, §§ 1273-74, at 526-529; *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (*per curiam*).

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absolutely no bearing on whether the *basis* of the plaintiff's claim was restitionary. To be clear: the whole reason why an equitable lien *by agreement* was needed in the first place was so that the measure of recovery would be based on the parties' prior agreement and *not* on a consideration of equitable factors. Put another way, the monies in *Sereboff* "belonged in good conscience" to the plaintiff only because these funds were the subject of a prior agreement. The situation here is no different. There was a prior agreement that if DeWolff depleted specific funds by breaching a duty under ERISA, it would restore these funds to petitioner's account.

3. Surcharge is not properly viewed as a "legal remedy" that was awarded by equity courts in trust cases

In *Mertens*, this Court expressly rejected the argument that any remediation for breach of trust is *necessarily* "equitable relief" because such claims were exclusively adjudicated by equity courts in times of the divided bench. *Mertens*, 508 U.S. at 257. Of course, *Mertens* did not suggest that any particular remedy for breach of trust would not qualify as "equitable relief" for purposes of section 502(a)(3). Rather, it held that a remedy's exclusive availability in pre-merger equity courts did not *by itself* prove that such a remedy is properly viewed as "equitable relief" for purposes of ERISA. In explaining this point, the Court noted that "[a]t common law * * * there were many situations—not limited to those involving enforcement of a trust—in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." *Id.* at 256 (citing 1 Pomeroy, *supra*, § 181, at 257).

In light of this discussion in *Mertens*, it is necessary to analyze whether the surcharge of a breaching fiduciary for losses caused to a trust is one such example of the pre-merger equity courts "establish[ing] purely legal rights and grant[ing] legal remedies which would otherwise be beyond the scope of [their] authority." *Id.* In other words, is surcharge properly viewed as a legal remedy that happened to be awarded by pre-merger equity courts only because such courts had exclusive jurisdiction over all cases involving trusts? As explained below, the answer to this question is no.

The initial Restatement of Trusts, published in 1935, expressly identifies the remedies that were historically available to redress a breach of trust as either "legal" or "equitable." For example, section 198 of the Restatement is entitled, "Legal Remedies of the Beneficiary." Restatement (First) of Trusts § 198 (1935). This section explains that, "[i]f

the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." *Id.* § 198(1). As the Restatement makes clear, this statement reflects the reality of pre-merger practice. See *id.* cmt. b ("At common law a person who held the legal title to money to which another person was beneficially entitled was liable to the other person in the common-law action of account. This form of action became generally obsolete and was superseded by a bill in equity and by the actions of debt and general assumpsit."). In other words, regardless of whether it was brought in a common law court of equity, a lawsuit by a beneficiary to collect monies wrongfully held by a trustee was one seeking "legal relief." And, this was true even if the beneficiary's legal theory for such a claim was denominated as "breach of trust." See *id.* § 198(2).

By contrast, section 199 of the Restatement is entitled, "Equitable Remedies of the Beneficiary." This section lists four equitable remedies available to a trust beneficiary: (1) "compel[ling] the trustee to perform his duties;" (2) "enjoin[ing] the trustee from committing a breach of trust;" (3) "compel[ling] the trustee to redress a breach of trust;" and (4) "appoint[ing] a receiver [to] administer the trust." *Id.* § 199. Respectively, these remedies can be described as (1) a mandatory injunction, (2) a prohibitory injunction, (3) surcharge, and (4) removal of the trustee. The precise contours of the third equitable remedy listed in this section (*i.e.*, "surcharge") are set forth in section 205 of the Restatement. See *id.* cmt. c ("If the trustee has committed a breach of trust, the beneficiary can maintain a suit to compel the trustee to redress the breach of trust (see § 205)."

Section 205 of the Restatement is entitled, "Liability in Cases of Breach of Trust." This section provides that a breaching trustee is "chargeable" with

> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or

> (b) any profit made by him through the breach of trust; or
>
> (c) any profit which would have accrued to the trust estate if there had been no breach of trust.

Id. § 205. These remedies can all be grouped under the heading of surcharge. Although the remedy may superficially appear akin to compensatory damages, it is a distinctly equitable remedy that differs from legal damages in several important ways.

First, surcharge has what could be described as a distinctly restitionary, rather than compensatory, focus. For example, the measure of recovery was often pegged to the fiduciary's improper gains. See *id.* § 205(b). And even when it was measured by the beneficiary's loss, it was limited economic injury. In other words, it did not allow a plaintiff to recover any compensation for non-pecuniary losses directly resulting from the trustee's breach (*e.g.*, pain and suffering). See, *e.g.*, E. Daniel Robinson, Note, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L. Rev. 1447, 1469 (2006) ("Surcharge provides only compensation for financial loss [and] requires proof of a precise amount of loss. * * * In contrast, tort damages have a much larger scope—they often compensate for nonpecuniary losses.") (citations and footnotes omitted). Nor did it historically allow a plaintiff to recover nominal or exemplary damages. 3 Scott & Fratcher, *supra*, § 204, at 239; Dobbs, *supra*, § 3.11(1), at 315.

Second, surcharge functions as much as a sanction than as a form of compensation. *Mosser v. Darrow*, 341 U.S. 267, 268, 274 (1951) (in remanding for a determination of whether a "trustee who, although making no personal profit, permitted key employees to profit" from misconduct, should be liable for surcharge, this Court noted that "trusteeship is serious business" and "[t]he most effective *sanction* for good administration is personal liability for the consequences of forbidden acts") (emphasis added). For this reason, it is not surprising that surcharge is listed in section 199 of the Re-

statement right alongside the unquestionably equitable remedy of removing a trustee.[23] And for the same reason, although a beneficiary could seek to surcharge a "trustee with any loss that resulted from the breach of trust," 3 Scott & Fratcher, *supra*, § 205, at 237, a court was empowered to settle on an amount *less than* the full value of the loss to the trust. As noted by the Restatement in a section entitled, "Power of the court to excuse breaches of trust,"

> This is similar to the English Trustee Act, 1925, § 61, which provides that if it appears to the court that a trustee is personally liable for any breach of trust, "but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

Restatement § 205 & cmt. g.[24] This type of flexibility is the touchstone of an equitable remedy. In the words of this Court, "[t]he essence of equity jurisdiction has been the power of the Chancellor to * * * mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

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[23] It is worth noting here that section 409 of ERISA, discussed at length in Part I, *supra*, specifically identifies "removal of [a] fiduciary" as one form of equitable relief. 29 U.S.C. 1109(a).

[24] The comment goes on to state that "In the absence of a statute it would seem that a court of equity may have power to excuse the trustee in whole or in part from liability where he has acted honestly and reasonably and ought fairly to be excused." Restatement § 205, cmt. g. This is perfectly consistent with Congress's use of the phrase "*appropriate* equitable relief" in sections 502(a)(3) and 502(a)(5).

4. The fact that surcharge may serve a compensatory function is irrelevant

Without conducting any of the historical analysis required by *Mertens*, *Knudson*, and *Sereboff*, most lower courts have summarily rejected the position of the United States that surcharge satisfies this Court's historical test for "equitable relief." Pet. 21. These courts, which include the Fourth Circuit below, have reached this conclusion largely because they have mistakenly read this Court's prior decisions as having already rejected the argument that surcharge is a form of "equitable relief."[25] In the words of one jurist,

> Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties and the rarity of decisions requiring a jury for such claims, I am persuaded that the Supreme Court's dictum in [*Knudson*], sends a signal that should not be ignored. * * * The statement is dictum with respect to an action against a fiduciary because the defendant in [*Knudson*] was not a fiduciary. But the Court appears to be little concerned with the nature of the defendant and critically concerned with whether the defendant is being compelled to disgorge specific, traceable funds in his possession, in which case the action is in equity, or to pay money out of his pocket, i.e., damages, to a claimant.

Pereira v. Farace, 413 F.3d 330, 344, 346 (CA2 2005) (Newman, J., concurring), cert. denied, 126 S. Ct. 2286 (2006). In essence, these courts are reading this Court's precedent to suggest that surcharge is nothing more than legal relief that happened to be awarded by pre-merger equity courts in

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[25] As the United States explains at length, U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 23-29, this Court has never held as such.

trust cases. These courts are wrong.[26] As explained above, surcharge is a unique remedy distinct from compensatory damages.

Once the purpose and conditions of the surcharge remedy are properly understood, it becomes clear that its "compensatory" character is no different than the "compensatory" character of other remedies that this court has already held to be "equitable." For example: the historical remedy of equitable restitution (enforced by means of a constructive trust or an equitable lien) entitled a plaintiff to recover an amount of money that was "unjustly" held by a defendant provided that certain technical conditions were met. This did not mean, however, that the monetary amount sought by the plaintiff did not *also* happen to compensate him for his loss. In fact, many cases of equitable restitution involve a requested disgorgement from the defendant of *the exact amount* that the plaintiff had lost. Despite this fact, this Court has held that restitution is "equitable relief" (*i.e.*, different from compensatory damages) as long as it can be obtained through a particular remedy that would have been awarded by a pre-merger court of equity under the factual circumstances alleged by the ERISA plaintiff.

So here, this Court should recognize that surcharge is an equitable remedy notwithstanding any compensatory purpose it may serve. To hold otherwise will, in the words of the United States, permit "[f]iduciaries [to] violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused." Brief of Sec'y of Labor as

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[26] If, however, this is a proper reading of *Mertens*, *Knudson*, and *Sereboff*, petitioner respectfully requests that this Court "revisit what [would then be a truly] unjust * * * ERISA regime," *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (CA3 2003) (Becker, J., concurring), and adopt the position advanced in one brief *amicus curiae* filed with this Court. See Nat. Employ. Lawyers' Assoc. Br. in Supp. of Pet. (arguing that *Mertens* should be overruled).

Amicus Curiae Supporting Appellant at 1, *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (CA10 2004) (No. 05-1415), 2003 WL 24309395. As the United States cogently explains, such could not have been Congress's intent in enacting section 502(a)(3). See U.S. Merits Br. in Supp. of Pet. as *Amicus Curiae* 20-23.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

1. **29 U.S.C. 1002 provides in pertinent part:**

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the

benefits under the plan or the method of distributing benefits from the plan.

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq.*], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties im-

posed on such investment company, investment adviser, or principal underwriter by any other law.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant–

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * * * *

2. 29 U.S.C. 1003 provides in pertinent part:

§ 1003. Coverage

(a) Except as provided in subsection (b) or (c) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * * * *

(c) If a pension plan allows an employee to elect to make voluntary employee contributions to accounts and annuities as provided in section 408(q) of Title 26 [26 U.S.C.A. § 408(q)], such accounts and annuities (and contributions thereto) shall not be treated as part of such plan (or as a separate pension plan) for purposes of any provision of this subchapter other than section 1103(c), 1104, or 1105 of this title (relating to exclusive benefit, and fiduciary and co-fiduciary responsibilities) and part 5 (relating to administration and enforcement). Such provisions shall apply to such accounts and annuities in a manner similar to their application to a simplified employee pension under section 408(k) of Title 26.

3. **29 U.S.C. 1104 provides in pertinent part:**

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * * *

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information

comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

* * * * *

4. 29 U.S.C. 1109 provides:

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

5. 29 U.S.C. 1132(a) provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

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No. 06-856

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IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 statement is included in the Brief in Opposition of the Petition of Writ of *Certiorari.*

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IN THE

Supreme Court of the United States

No. 06-856

JAMES LARUE,

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v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondent DeWolff, Boberg & Associates, Incorporated ("DeWolff") is a management consulting firm. DeWolff sponsors and administers Respondent DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan ("the Plan"). The Plan is a retirement plan maintained pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et. seq.*, and the Internal Revenue Code, and commonly known as a 401k plan. Petitioner James LaRue ("LaRue") was employed by DeWolff for several years and was a participant in the Plan. LaRue remained a participant in the Plan after he resigned from DeWolff in 2001. LaRue's status changed in July, 2006, two years after

this action was initiated, when he took a complete distribution of his interest in the Plan.[1]

LaRue alleges that, on two occasions in 2001 and 2002, he requested that changes be made to his investment allocations in mutual funds available to plan participants. He claims neither request was implemented, for reasons not explained and in circumstances not mentioned. In a complaint filed on June 1, 2004, two years after the second of these alleged requests, LaRue brought a civil action for breach of fiduciary duty against DeWolff and the Plan for failing to follow his investment directions. The complaint sought relief only under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), alleging that Respondents' fiduciary breach caused his interest in the Plan to be "depleted" by approximately $150,000. The complaint sought neither an injunction nor any other form of traditional equitable relief. BIO App. 4a.

The complaint alleged only that "Plaintiff directed the plan, by and through its' [sic] appointed agents and administrators, to invest his money and contributions in a certain way." BIO App. 3a. LaRue did not identify the entity allegedly responsible for failing to follow his directions. Neither did the complaint allege whether that entity is an ERISA fiduciary with respect to those transactions.[2] The complaint gave no

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[1] The Petition is thus incorrect in stating that LaRue is a "participant" in the Plan. Pet. for Cert. 5, 8. Lower courts are split on the question of whether a former employee who has cashed out of a 401k plan for reasons unrelated to the alleged breach of fiduciary duty can continue to maintain a claim under ERISA's civil enforcement provisions. *See infra* pp. 26-28. This issue, addressed in Respondents' pending motion to dismiss the writ, MTD 3-6, illustrates the problems presented if the Court were to conclude that ERISA § 502(a)(2) can be extended to an individual claim for compensatory damages.

[2] ERISA's fiduciary duty rules do not extend to ministerial actions, whether engaged in by employer plan sponsors, the plan itself, or service providers to the plan. *See infra* pp. 18-20.

reason why his requests were not implemented. LaRue did not claim any misrepresentation on the part of either DeWolff or the Plan in connection with the requests. The complaint alleged no plot or scheme by either DeWolff or the Plan to interfere with the requests. The complaint suggested no systemic failure in plan administration that caused his requests to be disregarded. The complaint thus argued that LaRue's requests were either lost, delayed or ignored in what can only be viewed as a simple case of miscommunication, or perhaps negligence.

Further the complaint did not allege that LaRue had been hindered in checking his account to ascertain whether his directions had been followed. There is no suggestion LaRue took any steps to confirm that his funds had been re-invested, and if not, to determine the reason for the delay. The complaint does not explain why LaRue waited two years—time to see how the stock market reacted after the alleged requests—before suing for monetary relief in the form of lost profits.

Moreover, because LaRue had not taken a distribution from the Plan, the complaint alleged no actual losses. The complaint claimed only that his account had been "depleted" in the amount alleged. The complaint nowhere claimed that any other plan participant was affected by the alleged failure to process his requests. Finally, the complaint alleged no ill-gotten gains by either DeWolff or the Plan.

Because LaRue invoked only § 502(a)(3) in the complaint, LaRue did *not* enter the Plan document into the record. The complaint thus did not identify any provisions in the Plan that would be relevant to determining how the alleged loss to LaRue's individual account would be treated under the Plan, or whether the alleged "depletion" would have any impact on other plan participants. This omission also prevents an assessment of whether there is a basis in the language of the

Plan to warrant the characterization that a recovery in this case would produce an incidental benefit to the Plan.[3]

Respondents answered the complaint. The answer denied that LaRue made one of the two cited requests. *See infra* pp. 2a-3a. Respondents conceded that the other request was made. Respondents asserted, *inter alia,* that LaRue rescinded that request shortly after it was made, presumably because market fluctuations made it more profitable for him to cancel the transaction. *See infra* pp. 2a-3a. Both Respondents denied that either of them was acting in a fiduciary capacity in connection with the alleged requests. *Id.*

Respondents moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Respondents asserted that the monetary relief sought by LaRue constituted compensatory damages in the form of lost profits that are not available under § 502(a)(3).

The district court granted Respondents' motion and dismissed the case with prejudice. Pet. App. 15a-21a, 30a-31a. The court held that LaRue's attempt to recover the estimated amount his plan account might have earned, was not equitable relief. The court explained that the money damages LaRue sought could only be characterized as a claim for lost profits: "[t]he $150,000 never belonged to plaintiff because it represents potential value, not actual earnings; as such, there is nothing to restore. Nor is the amount in the defendants' possession. Awarding plaintiff $150,000 as restitution would

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[3] LaRue attached the Plan's Summary Plan Description as Exhibit A to the Complaint, erroneously asserting that it was the Plan Document. BIO App. 2a. LaRue repeats that error in his presentation to this Court, citing to the summary plan description and implying that it is the same as the Plan document. *See* Pet. Br. 17-18. LaRue's failure to include the Plan document in the record renders speculative various arguments made by LaRue and his *amici*, attempting to re-characterize this case as presenting a cognizable claim under § 502(a)(2), based on assumptions as to the language in, and actual operation of, the Plan. *See infra* pp. 21-23.

impose personal liability on defendants." Pet. App. 17a. Thus, the court found that it could not fashion any relief that would be "consistent with the guidelines of *Great-West, Rego* and *Sereboff*" under § 502(a)(3). BIO App. 44a.

LaRue appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court. Pet. App. 1a-14a. The Fourth Circuit held that LaRue's claim failed because he did not seek equitable restitution as the funds he sought were not in Respondents' possession. The court reasoned that LaRue was seeking legal remedies "gauge[d] . . . by the value of his own loss," and, "[t]hat plaintiff can analogize this suit to a common law breach of trust action . . . proves no avail in characterizing the relief he seeks as equitable." *Id.* at 10a-11a. The court then addressed the ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), claim, which was raised for the first time on appeal. The court held that "[e]ven if the argument were not therefore waived," LaRue could not recover under a § 502(a)(2) theory. Pet. App. 5a. The court explained that LaRue sought "recovery of the amount by which his account would have appreciated had defendants followed his instructions." Pet. App. 2a. Having found that LaRue was seeking his own lost profits, the court stated, "[i]t is difficult to characterize the remedy plaintiff seeks as anything other than personal." Pet. App. 6a. Thus, since LaRue sought "to particularize the recovery to himself" as opposed to seeking a benefit that would inure to the Plan as a whole, the court held that LaRue's § 502(a)(2) theory failed as well.

LaRue then filed a petition for rehearing and rehearing *en banc*; the United States Secretary of Labor filed an *amicus curiae* brief in support of that petition. The Fourth Circuit rejected the arguments made by the Secretary, and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a. The Secretary argued that § 502(a)(2) allowed an individual to bring a claim on his own behalf. The court disagreed, stating "Neither the text of Section 502(a)(2) nor

Supreme Court precedent contemplate a remedy for individual, rather than plan, losses." Pet. App. 24a. The court noted that all of the authorities cited by the Secretary involved a subclass of participants and not an individual participant. The court went on to say that adopting the Department of Labor's "expansive view" of the statute would "recalibrate the balance" between Congress' desire to "provide fair and generous remedies for plan participants without imposing ruinous personal liability on plan fiduciaries." Pet. App. 2a, 28a. Concluding that it was not its role to expand the statute beyond Congress' intent, the court denied the request for rehearing.

LaRue petitioned for *certiorari*. After requesting the views of the United States, and having been apprised of those views, this Court granted the petition with respect to both the § 502(a)(2) and § 502(a)(3) questions. After the petition was granted, Respondents filed a motion to dismiss the writ because it had not been made clear in the petition that, after the Fourth Circuit's decision, LaRue had withdrawn from the Plan. That motion, which argues that LaRue's decision to cash out of the Plan fundamentally changes the nature of the issues presented to this Court, remains pending on the date of this brief.

SUMMARY OF ARGUMENT

Petitioner asks this Court to reconsider or overrule seminal decisions on two separate issues of statutory construction. And the outcome urged by the Petitioner is irreconcilable with the Court's decisions in a third line of cases involving the same statute. The Court should reject Petitioner's invitation.

LaRue and his *amici* ask the Court to reconsider its decision in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), by permitting LaRue to start over in the district court with a claim under § 502(a)(2). *Russell* is

widely understood to bar claims for purely individual recovery of damages brought under § 502(a)(2). In *Russell*, the Court's careful analysis of the text, legislative history and purpose of ERISA led to the conclusion that § 502(a)(2) is limited to actions brought for "the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. This case provides no basis for the judicial invention of a brand new cause of action under § 502(a)(2). The claim was not litigated in the district court and comes to this Court without the benefit of a fully developed record. On the merits, the case involves the paradigmatic situation of an individual loss, which cannot reasonably be characterized as "losses to the plan" within the meaning of § 409 and § 502(a)(2). The Court should reaffirm *Russell* to make it clear that an attempt to seek an individual damages recovery is not available under § 502(a)(2).

The claim LaRue actually brought in the district court, for monetary damages under § 502(a)(3), fares no better. Following this Court's decisions in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) and *Great-West Insurance v. Knudson*, 534 U.S. 204, 209 (2002), it is settled that a claim for money damages is not available under § 502(a)(3), which permits only the recovery of "appropriate equitable relief." The efforts by LaRue and his *amici* to re-characterize his claim for lost profits, the quintessential claim for damages at common law, into a claim for equitable relief, are unavailing. LaRue's suggestion that *Mertens* should be overruled is unwise. LaRue's further assertion that his claim for damages is really a claim for equitable relief because it could be relabeled as a claim seeking a surcharge against the Plan's fiduciaries falls of its own weight. The fact that an equity court in the days of the divided bench may have been empowered to award monetary relief against a trustee does not transform the nature of that remedy. Nor does the occasional availability of such relief make it "typically available." LaRue's recitation of the remedies available in 18th century England confirms that such a

remedy was the exception to the general rule that claims for monetary relief were not "typically available" in equity.

LaRue seeks an outcome that would be irreconcilable with this Court's ERISA preemption cases. In a series of decisions over thirty years, running from *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) through its unanimous decision three years ago in *Aetna Health v. Davila*, 542 U.S. 200 (2004), the Court has decided that ERISA preempts a wide variety of state law-based claims brought against parties involved in the administration of employer-sponsored welfare benefit plans. These decisions are based on the recognition that state law claims against sponsors of ERISA plans are preempted precisely because they seek remedies not available under § 502, which provides the exclusive means for remedying alleged violations of ERISA. In the wake of these decisions, it would be a surprise to learn that such claims for damages were available all along under ERISA itself.

A decision permitting LaRue's claim to proceed would yield an outcome flatly inconsistent with both the text and the objectives of ERISA, with respect to both retirement and welfare benefit plans. The Court has made clear that ERISA is a "complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. The same policy decisions animating this Court's preemption case law—the concern expressed by Congress that ERISA should not discourage the voluntary formation of employee benefit plans by imposing additional costs on plan sponsors—apply with equal, if not greater, force to the administration of 401k plans. Defined contribution plans are increasingly replacing traditional defined benefit pension plans as the principal vehicle for employers who choose to offer retirement plans for their employees. Encouraging employers to continue to maintain such plans is a cornerstone of the public policy of encouraging employees to save for retirement. Congress

surely did not intend an outcome that would open the same door the Court just closed in connection with claims against health plan sponsors and managed care companies, and permit that same torrent of litigation to be brought against sponsors of defined contribution retirement plans and their service providers.

ARGUMENT

I. BECAUSE THIS CASE DOES NOT INVOLVE "LOSSES TO THE PLAN" WITHIN THE MEANING OF SECTION 409, THE COURT SHOULD REJECT THE SECTION 502(a)(2) THEORY AND AFFIRM THE FOURTH CIRCUIT

A. Congress Provided for only Certain Remedies in ERISA Cases

ERISA's civil enforcement scheme consists of "six carefully integrated civil enforcement provisions." *Russell*, 473 U.S. at 146. This Court has repeatedly emphasized that Congress' deliberate care in expressing ERISA's enforcement scheme "provide[s] strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (emphasis in original). *See also Great-West*, 534 U.S. 204; *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000); *Pilot Life*, 481 U.S. at 54. The Court has been equally consistent in its reluctance to tamper with ERISA's enforcement scheme because "'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Russell*, 473 U.S. at 147 (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981)). In *Pilot Life*, the Court reaffirmed the teaching of *Russell* that the exclusivity of § 502(a)'s remedial provisions is consistent

with both ERISA's plain language and its legislative history. *Pilot Life*, 481 U.S. at 54-55.

ERISA's "complex and detailed" statutory scheme "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. In determining whether a particular remedy is authorized by § 502(a), courts "have to take account of competing congressional purposes" in enacting ERISA, including Congress' "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers" from offering benefit plans in the first place. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78-81 (1995)) and *Mertens*, 508 U.S. at 262-63. *See also Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (ERISA does not require employers to establish employee benefit plans or a certain level of benefits under a plan); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003).

LaRue expresses his general view of the statutory purpose, but this Court has recognized in this context that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 U.S. at 261. Unlike statutes such as Title VII, the remedial purpose of § 502(a)(2) is "not to make the aggrieved employee whole." *Millsap v. McDonnell Douglas*, 368 F.3d 1246, 1260 (10th Cir. 2004) (citing *Mertens*, 508 U.S. at 253, 261-62 and *Russell*, 473 U.S. at 138, 142, 148). *See also Chauffers, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. 558, 572 (1990) (distinguishing between Title VII, which is "restitutionary in nature," from claims arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 seeking damages for violation of the duty of fair representation).

In language particularly relevant to this case, this Court has stated that "[a] fair contextual reading of the statute makes it

abundantly clear that its draftsmen were primarily concerned with . . . *remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.*" *Russell*, 473 U.S. at 141 (emphasis added). The fact that the remedies provided by the statute are insufficient to remedy every conceivable wrong is, therefore, a simple reflection of the political compromises and policy judgments made by Congress.

The arguments made by LaRue and his *amici* rest on the contrary assumption that Congress would have wanted to remedy every wrong that conceivably could befall an individual plan participant or beneficiary. The legal theories advanced by LaRue thus proceed from the premise that the "carefully integrated civil enforcement provisions" of ERISA should have no gaps. With that premise, LaRue and his *amici* apparently believe it is easier to interpret the words of the statute to support a compensatory damages remedy here, in what the lower courts correctly called a claim for lost profits arising out of simple negligence.

LaRue asks the Court to stretch ERISA to provide a compensatory damages remedy for every alleged ERISA wrong. The Court has heretofore rejected such a construction of § 502, it being widely understood that ERISA does not provide a complete package of remedies. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 836 (1988) (observing that Congress decided to limit state law garnishment claims against ERISA pension plans and not welfare plans); *Davila*, 542 U.S. at 222-23 (Ginsburg, J., concurring). *See* Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise*, 81 Iowa L. Rev. 1, 19 (1995) ("A number of gaps exist in [section 502] enforcement pro-visions"); Jay Conison, *Suits for Benefits under ERISA*, 54 U. Pitt. L. Rev. 1, 7 (1992) (suggesting that ERISA "leaves huge gaps in the regulation" of certain aspects of employee benefit plans). This case is a poor candidate for a dramatic reinter-pretation of the statute.

At issue is nothing more than a supposed request that someone change an individual's mutual fund investment allocation. There was no judgment to be exercised in processing the transaction; the direction was ministerial in nature. There was no question of self-interest, bad faith or improper motive on behalf of either DeWolff or the Plan. *Cf. Varity Corp.*, 516 U.S. at 493. The essence of the claim is no more than an apparent miscommunication in connection with a matter affecting only one individual's plan account.

Moreover, there is no suggestion of any loss—in the sense of an actual out of pocket loss—to LaRue. *Rego v. Westvaco Corp.*, 319 F.2d 140, 146 (4th Cir. 2003) (ERISA claim failed where it "in no way correspond[ed] to any out of pocket loss"). LaRue's investment in the mutual funds held at the time of the alleged requests certainly was not "lost;" there is no allegation that the plan administrator took any affirmative action that reduced the value of LaRue's individual plan account. Rather, the plan administrator (or one of its agents) is alleged to have failed to act on an investment direction that, if taken, would ostensibly have resulted in *greater profits* for LaRue. The validity of that claim, in turn, requires one to make the additional assumption that LaRue would have "beat the market" with his subsequent investment choices. (Of course, if the miscommunication resulted in a benefit to LaRue, *i.e.*, if his proposed investment reallocation did not turn out to be favorable because the share prices in the intended mutual fund investments dropped—it is safe to assume LaRue would never have brought this claim, content to leave unremedied the ostensible failure to follow his instructions). *See Steinman v. Hicks*, 352 F.3d 1101, 1104 (7th Cir. 2003) (Posner, J.) (affirming district court's finding of no § 502(a)(2) violation, noting that "no one could know" at the time of the transaction at issue how the stock and bond markets would eventually value the acquiring company's stock). In any event, the claim is purely one of speculative lost profits that no one—certainly not DeWolff or the Plan—

ever realized. It is thus a demand for lost profits universally regarded as a classic remedy at law.

LaRue claims neither obstinance nor an affirmative lack of due diligence by either DeWolff or the Plan. He simply claims to have given an investment instruction; he does not claim to have been misled by subsequent reports that his instructions had in fact been followed. Nor does the complaint allege any other circumstances that might justify his failure to seek the obvious equitable remedy available to him—an injunction to force the plan administrator to ensure the mutual fund trade was executed. LaRue does not even claim to have examined his account to confirm that his instructions were implemented. LaRue just claims to have asked someone to make a change in his investment accounts that now, in hindsight, he thinks would have been a good one. This is precisely the kind of "heads I win, tails you lose" damages claim that Congress could reasonably believe should not be permitted.

Congress explicitly rejected language contained in an earlier version of § 502 that would have permitted the recovery of legal as well as equitable damages. *Russell,* 473 U.S. at 146, n.14.[4] Congress thus recognized that permitting suits of this type would have obvious negative consequences for plan sponsors and their service providers, to the detriment of

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[4] ERISA is thus materially different in this respect from the Labor Management Disclosure and Reporting Act of 1959 (LMRDA), 29 U.S.C. § 400 *et seq*, which, *inter alia,* codified certain trust law principles in establishing fiduciary standards for officers of labor union. Unlike ERISA, the civil enforcement provision of the LMRDA, 29 U.S.C. § 501(b), expressly authorizes recovery of "damages" as well as "other appropriate relief." *See Guidry v. Sheet Metal Workers Pension Fund,* 493 U.S. 365, 375-76 (1990). Because Congress is presumed to legislate purposefully against the backdrop of existing law, *see Cannon v. Univ. of Chicago,* 441 U.S. 698 (1979), Congress' failure to include the term "damages" in § 502(a)(3) is thus significant.

ERISA's goal of encouraging plan formation. This type of suit requires no evil intent or bad faith, of the kind that a good faith plan administrator could knowingly avoid. It requires no conscious decision by a plan fiduciary. Rather, it involves an allegation of—at most—simple negligence through omission. According to LaRue, the purported remedy for this omission is not return of money improperly generated (as in equitable restitution), but rather damages in the form of lost profits.

Such large scale liabilities for an ordinary administrative mistake in connection with ministerial tasks to be performed by plan administrators or their agents would surely be seen as imposing significant costs on employer-sponsored plans. Individual plan participants in 401k plans would be able to exercise 20/20 hindsight and sue for damages in a variety of "he said/she said" circumstances. Plan sponsors could expect a torrent of litigation from individual plan participants unhappy with their investment returns over time. Plan sponsors and their service providers would face increasingly expensive fiduciary insurance policies to cover such routine ministerial mistakes.

Congress could reasonably regard such damages remedies as counterproductive to ERISA's objective of encouraging plan formation. Congress' enactment of the Pension Protection Act of 2006, Pub. L. 109-280 (PPA) confirms that voluntary employer sponsorship of retirement plans is critical to the national policy of encouraging current workers to save for retirement. The PPA provides, *inter alia,* additional flexibility for employers who wish to increase participation rates in defined contribution plans through devices like automatic enrollment. The PPA also permits employers to take other measures, such as offering workers investment advice in some circumstances, to help employees achieve better overall financial returns in their 401k plan accounts. Regulations proposed by the Department of Labor are intended to provide

employers with guidance on these matters in the context of "employers' fiduciary responsibilities." Gov't Accountability Office, "Employer-Sponsored Health and Retirement Benefits: Efforts to Control Employer Costs and the Implications for Workers," GAO 007-355, at 35 (2007) available at www.gao.gov/new.items./007355.pdf.[5] The objective of these provisions would be undermined by the judicial creation of a new species of fiduciary breach litigation to be brought against sponsors of defined contribution plans. *See Jenkins v. Yager*, 444 F.3d 916, 919-23 (7th Cir. 2006) (rejecting claim that 401k plan administrator failed to monitor participant's investment choices in violation of § 404 of ERISA).

The Fourth Circuit's concern about the negative consequences of increased litigation against 401k plan sponsors, Pet. App. 24a, is consistent with this Court's recognition of the political compromises reflected in ERISA. *Mertens*, 508 U.S. at 262-63 ("There is . . . a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs. . . . We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck'" (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)). In this context, Congress' resolution of this tension is contained in § 502(a)(3), which authorizes an *equitable action* (but not

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[5] Certain provisions in the PPA are explicitly intended to encourage small employers, like DeWolff, to continue to sponsor retirement plans. Other Congressional legislation has had similar objectives. *See* Congressional Research Service, "Pension Sponsorship and Participation: Summary of Recent Trends," (Sept. 6, 2007) available at www.opencrs.com/rpts/RLK30122-2006 0831.pdf ("Congress has sought to encourage greater retirement plan sponsorship among small businesses mainly by easing the financial and reporting requirements associated with certain types of defined contribution pension plans," citing the *Revenue Act of 1978* (P.L. 95-600) and *Small Business Job Protection Act of 1996* (P.L. 104-188) as examples).

compensatory damages) to compel the plan administrator to follow an investment instruction. In light of the availability of swift equitable relief, a damages remedy of the kind advocated here could only be seen as undermining the creation of private sector retirement plans that Congress sought to encourage.

B. This Case does not Involve "Losses to the Plan" Within the Meaning of ERISA § 409

1. ERISA § 502(a)(2) authorizes a "participant, beneficiary or fiduciary" to bring a civil action for "appropriate relief under Section 1109 [Section 409] of this title." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, states that "any person who is a fiduciary with respect to a plan . . . shall be personally liable to make good *to such plan any losses to the plan* resulting from" a breach of fiduciary duty. 29 U.S.C. § 1109(a) (emphasis added). LaRue's claim does not fit this definition.

LaRue's argument proceeds from the premise that an alleged loss in value to an individual's account balance (whether an actual out-of-pocket loss alleged in *Goeres*, or the claim for lost profits asserted here by LaRue) necessarily constitutes a separate and further injury to the Plan. That premise is mistaken in a case like this one where it is not even alleged (and inconceivable in any case) that the interest of any other participant in the Plan was affected by the fiduciary breach asserted. As a textual matter, LaRue's argument effectively asks the Court to amend § 409(a) to read that a fiduciary should be personally liable to make good "any losses ***incurred by an individual participant in*** the plan," irrespective of whether the Plan itself, or any other plan participants, can be said to have suffered any losses. There is no indication that Congress intended § 409 to extend to an individual claim for lost profits having no impact on any other plan participant, or, more broadly, on the Plan itself.

This Court has described ERISA's civil enforcement provisions as an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). This Court has made clear that § 409 authorizes only a claim that "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Consistent with *Russell*, the Court has recognized that § 502(a)(2) "does not provide a remedy for individual beneficiaries." *Varity Corp.*, 516 U.S. at 515 (quoting *Russell*).

This construction of § 502(a)(2) is long-settled. Congress has not sought to override it, notwithstanding rulings by the lower courts declining to allow § 502(a)(2) to be converted into a vehicle for individual plan participants to collect damages.[6] *See Fox v. Herzog Heine Geduld Inc.*, No. 06-1333, 2007 WL 1113802, at *1 (3d Cir. April 16, 2007); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); *Magin v. Monsanto Co.*, 420 F.3d 679, 688 (7th Cir. 2005) (plaintiff could

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[6] Consistent with this understanding, the Department of Labor has, contrary to the position asserted here by the Solicitor General, conceded that § 502(a)(2) is not available in cases in which individuals seek a recovery for breach of fiduciary duty under § 502(a)(3). *See* Brief of Sec'y of Labor as *Amicus* Curiae Supporting Appellant, *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004) (No. 05-1415, 2003 WL 24309395); Brief of Sec'y of Labor as *Amicus* Curiae Supporting Appellant, *Green v. ExxonMobile Corp.*, 470 F.3d 415, 421 (1st Cir. 2006) (No. 06-1452) 2006 WL 3226460; Brief of Sec'y of Labor as *Amicus Curiae* Supporting Appellant in *Ostler v. OCE U.S.A., Inc.*, (No. 01-3801) (7th Cir. Jan. 14, 2000) n.8 at http://www.dol.gov/sol/media/briefs/ostlervOCE(A)-2-8-2002.pdf ("Although Sections 409 and 502(a)(2) of ERISA expressly permit the recovery of losses sustained by the plan as a whole, these provisions do not apply to losses sustained by individual participants. Fiduciary misconduct resulting in individual injuries can only be redressed by the recovery of equitable relief under Section 502(a)(3) of ERISA"). The Government makes no attempt to explain its change of position.

not recover "his personal enhanced severance benefits"); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995); *Tullis v. UMB Bank, N.A.*, 464 F. Supp. 2d 725, 730 (N.D. Ohio 2006) (plaintiffs seeking "individualized compensatory damages to remunerate for their individual claims" may not recover); *Pfahler v. National Latex Co.*, 405 F. Supp. 2d 839 (N.D. Ohio 2005); Muir, 81 Iowa L. Rev. at 24 ("In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court determined that Section 409 and Section 502(a)(2) do not permit individual claimants to recover extra-contractual damages on their own behalf").[7] LaRue and his *amici* cite no authority for the notion that § 502(a)(2) should provide a cause of action for an individual seeking to hold a plan fiduciary personally liable in a case of simple negligence

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[7] Some courts have suggested, in what are known as the "stock drop" cases, that a claim can be brought under § 502(a)(2) on behalf of a subset of 401k plan participants even if the alleged fiduciary breach did not affect *every* plan participant. *See, e.g., Milofsky v. American Airlines, Inc.*, 442 F.3d 311 (5th Cir. 2006); *Graden v. Conexant Systems, Inc.*, -- F.3d --, No. 06-2337, 2007 WL 2177170 (3d Cir. July 31, 2007); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005). Those cases involve systemic claims of fiduciary breach in circumstances where the alleged misconduct affected a substantial number of plan participants. Indeed, in those cases, the duty being breached is, in a very real sense, a breach of duty to the Plan itself. Here, by contrast, there is no suggestion that Respondents engaged in a pattern and practice of refusing to honor the investment directions made by any other plan participants. The Fourth Circuit was surely correct in concluding both that the stock drop cases are distinguishable and that its decision simply does not implicate the concerns presented in those cases. ("This case is much different from a § 1132(a)(2) action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants . . . Here, by contrast plaintiff seeks to particularize the recovery to himself") (internal citations omitted). Pet. App. 6a.

affecting only one plan participant in circumstances that would not justify equitable restitution.[8]

LaRue's claim is the paradigm of an individual loss that cannot fairly be re-characterized as "losses to the Plan." The whole theory is about a loss (and a recovery) that is extrinsic to the Plan. This is a claim for speculative lost profits that never actually accrued to anyone, let alone anyone associated with the Plan. It is truly difficult to imagine a more individualistic type of claim. Moreover, there is no allegation of any breach of duty to the Plan in any meaningful sense.[9]

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[8] The Government suggests that, because ERISA's fiduciary duty obligations extend to an individual plan participant, relief should be available to LaRue here under § 502(a)(2). U.S. Br. 10. But every case relied on by the government is distinguishable, as each involves a situation in which the fiduciary received some economic advantage from the conduct in question. *See* Employee Benefits Sec. Admin., U.S. Dep't of Labor: *Fact Sheet: Retirement Security Initiatives* (Apr. 2007) at http://www.dol.gov/ebsa/newsroom/fsecp.html (describing *Chao v. Long* and *Chao v. IMDC Inc.*, where the Department of Labor brought cases alleging failure to forward plan contributions to individuals' accounts). Petitioner makes a similar argument, invoking various hypothetical situtions involving a plan fiduciary's duty to an individual plan participant. Pet. Br. at 23-24. Those examples are likewise distinguishable because each involves some type of fiduciary self-dealing or unjust enrichment not present here. This Court's decisions in *Mertens*, 508 U.S. 248 (1993), *Great-West*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) teach that equitable restitution would be available in those circumstances.

[9] There is a substantial question as to whether LaRue even pled a valid cause of action for breach of fiduciary duty, in that the complaint neither identified the entity responsible for the alleged miscommunication nor alleged that the entity was acting in a fiduciary capacity with respect to that transaction. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) (fiduciary status is the threshold question in determining whether a claim of fiduciary breach is properly stated). *See also IT Corp. v. General American Life Ins. Co.*, 107 F.3d 1415, 1420 (9th Cir. 1997) ("[T]he power to err, as when a clerical employee types an erroneous code onto a computer screen, is not the kind of discretionary authority which turns an

Rather, the breach of duty alleged here is solely to LaRue.[10] Nor can this case be shoe-horned into a viable claim under § 502(a)(2) by recasting the nature of a potential recovery. Any recovery ultimately available to LaRue under this legal theory is one that would benefit *him* and him alone.[11]

The contrary argument made by the Government is unavailing. Based solely on the unremarkable observation that legal title to all assets in a 401k plan is held in the name of the plan, the Government reasons that any loss to an individual participant must also be viewed as "losses to the plan." U.S. Br. 8-9. The Government thus asks the Court to

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administrator into a fiduciary"); *Kyle Rys., Inc. v. Pacific Admin. Serv.*, 990 F.2d 513, 516-17 (9th Cir. 1993) (insurance company is not a fiduciary when it negligently administered claims under the plan). Nor did the complaint make a specific assertion as to the particular breach of ERISA's fiduciary duty rules allegedly made by either Respondent. For example, the complaint did not allege that Respondents "failed to monitor" the conduct of service providers to the Plan. *Cf. Jenkins v. Yager*, 444 F.3d 916, 919-23 (7th Cir. 2006).

[10] LaRue misreads the Fourth Circuit's reasoning on the issue of whether ERISA's fiduciary duty obligations extend to a single plan participant. The correctness of that general proposition is immaterial to the key fact that informed the lower courts' decisions in this case: LaRue is complaining about an alleged mistake that, by definition, affected him and him alone. Pet. App. 6a. LaRue and his *amici* are thus incorrect in arguing there is no principled basis to distinguish among fiduciary breaches affecting one individual and claims affecting a broader subset of plan participants. *See, e.g.*, Pet. Br. 23-27. The statute provides the answer: § 502(a)(2) provides redress for fiduciary breach claims alleging "losses to the Plan," while § 502(a)(3) permits an individual plan participant to recover "approproptiate equitable relief." *Mertens*, 508 U.S. at 253-54.

[11] That any recovery [illegible] available in this case would flow strictly to LaRue and not [illegible], as required by § 409, is confirmed by LaRue's decision to cash out of the Plan. Respondents' pending motion to dismiss the writ demonstrates that LaRue's decision leaves him without a legally cognizable interest in the recovery under the legal theory supporting the § 502(a)(2) argument, thereby mooting this case. MTD 3-4.

recharacterize LaRue's claim by imagining a kind of straw transaction where the recovery would be funneled through the Plan and then immediately into LaRue's pocket. But precisely because of the need for such funneling, this claim does not involve losses to the Plan. This is because the Government's argument proceeds on a false premise. The complaint asserts no allegation of any generalized losses to the Plan, and there is no basis on which to claim that any other plan participant is even indirectly affected. *See* BIO App. pp. 1a-4a.

Nor does the argument properly focus on the words of the statute. Respecting the different purposes reflected in the various subsections of § 502, the Court in *Russell* stated that § 502(a)(2) claims must be "brought in a representative capacity on behalf of the plan as a whole," in order to advance the "financial integrity of the plan." *Russell*, 473 U.S. at 142, n.9. LaRue's claim, unique to him, was not brought in any sort of representative capacity, nor with any conceivable goal of improving the financial condition of the Plan itself.

The Government's reading of § 502(a)(2) is also counterintuitive. If it were true that any claim of fiduciary breach could be brought by an individual under § 502(a)(2), there would be no need for the language Congress added in § 502(a)(3). *See Coan*, 457 F.3d at 262; *Heffner v. Blue Cross & Blue Shield of Alabama, Inc.*, 443 F.3d 1330, 1339 (11th Cir. 2006). *See also LaRocca v. Borden, Inc.*, 276 F. 3d 22, 28 (1st Cir. 2002).[12]

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[12] The § 502(a)(2) theory suffers from the additional problem of appearing to be mutually exclusive of the § 502(a)(3) claim. The Court in *Varity* characterized § 502(a)(3) as one of two catchall provisions in ERISA, available in cases where other subsections of § 502(a) would provide inadequate relief. *Varity*, 516 U.S. at 512. The Court expressed its expectation that in such cases "there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate'" within the meaning of § 502(a)(3). *Id.*, at 515. While this Court has not yet directly addressed the issue, lower courts have widely interpreted this

2. Because of the obvious weakness in the suggestion that a recovery for LaRue is *per se* a recovery to the Plan, LaRue and his *amici* labor to suggest that this case offers a separate "recovery" to the Plan incident to the individual recovery intended for LaRue. They claim, for instance, that a recovery here would go first to the Plan, to absorb Plan expenses, before the remainder would be allocated to LaRue. Pension Rts. Ctr. Br. 4; Law Profs. Br. 11-12. This claim is speculative.

Because LaRue did not enter the Plan document into the record,[13] the Court is unable to assess, for example, whether the Plan includes the critical features assumed by LaRue and his *amici*. It is thus speculative to assume that assets of individual participants in the Plan are, in fact, pooled. ERISA permits a 401k plan to have individual participant accounts, by which individuals make their own investment choices. *See* 29 C.F.R. § 2550.404c-1(a). Many defined contribution plans include this feature, and many such plans operate without any

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observation to mean that a § 502(a)(3) remedy is *not* available in a situation in which a plaintiff proceeds under another subsection of § 502(a). *See Korotynska v. Metropolitan Life Ins. Co.*, 474 F.3d 101, 105 (4th Cir. 2006); *Bowles v. Reade*, 198 F.3d 752, 759-60 (9th Cir. 1999); *Burke v. Pitney Bowes, Inc. Long-Term Disability Plan*, No. C04-4483, 2006 WL 13097, at *11 (N.D. Cal. Jan. 3, 2006). *But see Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 89 (2d Cir. 2001).

[13] LaRue's tactical litigation decision in this respect is consistent with the theory litigated in the district court. LaRue never suggested this case involved "losses to the Plan," and argued only that his claim for monetary relief could be characterized as appropriate equitable relief within the meaning of § 502(a)(3). LaRue thus had no reason to enter the Plan document into the record, or to develop otherwise the factual arguments now advanced in support of the theory made for the first time in the court of appeals. That LaRue chose not to make the claim in the district court is a good indication of its lack of merit. And, as the Fourth Circuit observed, Pet. App. 5a, the § 502(a)(2) argument was waived. *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004); *McCarthy v. Bruner*, 323 U.S. 673 (1944).

sort of pooling of plan assets. *See* "Pros and Cons of Self-Directed 401Ks," by the Financial Planning Association (Oct. 15, 2001) available at http://accounting.smartpros.com/x31218.xml (stating that participants in some types of plans must pay for the transactions costs out of their individual accounts). The Government's argument that the Plan provides for forfeitures to be allocated to other participants, U.S. Br. 14, is another assumption not supported by the record. It is likewise speculative to assume that the Plan includes a general trust account used to pay expenses incurred by the Plan. Nothing in either ERISA or the Internal Revenue Code requires that a plan be structured in that manner. *See generally* ERISA § 402. For all LaRue and his *amici* know, all Plan expenses are either paid entirely by DeWolff and/or charged to individual plan accounts.

Yet contrary assumptions are critical to the argument made by LaRue that § 502(a)(2) can be read to extend to an individual claim for lost profits in these circumstances. If, for example, assets in the Plan are *not* pooled, it is difficult to imagine how a potential loss in value to one participant's individual account could possibly affect the value of the assets held by other participants. For the same reasons, if LaRue and his *amici* are incorrect in assuming that the Plan has a general account from which plan expenses are paid, the notion that a recovery here would "inure to the benefit of the plan" falls away.

Moreover, even if such incidental benefits could accrue to the Plan at the margin, they would be insufficient to transform LaRue's extraordinarily personal attempt to recover alleged lost profits into a case that is really being pursued for the Plan. The Fourth Circuit thus correctly concluded that this case cannot properly be viewed as presenting "losses to the Plan" in the absence of any conceivable impact on other Plan participants. Pet. App. 6a. ("The measure of that recovery is a loss suffered by him alone").

3. The Government's reliance on ERISA § 404(c) does not advance LaRue's cause. Section 404(c) provides a defense for an entity that would otherwise be a plan fiduciary, as well as for an admitted fiduciary, where the plan meets the criteria set forth in the regulations implementing § 404(c). LaRue does not allege that the Plan was designed to comply with § 404(c), and there is no factual basis to assume otherwise. The Fourth Circuit's decision thus has nothing to do with a statutory exemption that was designed for a different type of plan. The court's decision hardly renders § 404(c) superfluous; it is simply not implicated here.

4. The Court's ERISA preemption jurisprudence, running from *Pilot Life* through *Davila*, shows a keen awareness of Congress' objective in enacting ERISA to encourage employers to continue to offer employee benefit plans. *Pilot Life*, 481 U.S. at 54 (ERISA "represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"). *See Hutchison v. Fifth Third Bancorp.*, 469 F.3d 583, 589 (6th Cir. 2006) ("In addition, allowing [the] state-law claim to proceed might discourage the creation of employee benefit plans in the future"). Decisions in the ERISA preemption cases also reflect the Congressional concern that plan administration costs, including litigation costs, not threaten the solvency of benefit plans. *Davila*, 524 U.S. at 215. Those same concerns apply to pension plans. *See Russell*, 473 U.S. at 148, n.17; H. Conf. Rep. No. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5083, 5167, *and* 3 Legislative History of ERISA at 4673 (1976) (remarks of Senator Ullman) ("[P]ension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill," explaining that such a burden would be "self defeating" and "unfavorable" to the employees who are meant to benefit from the legislation).

The rise of defined contribution plans suggests that the Court should be particularly reluctant to create new remedies that would increase the cost of 401k plan administration. Defined contribution plans are increasingly replacing traditional defined benefit plans as the vehicle of choice for employers who choose to provide retirement benefits for their employees. Choice is the operative construct. Employer sponsorship of retirement plans, like medical plans, is entirely voluntary. *See* Muir, 81 Iowa L. Rev. at 51 (voluntary nature of employee benefit plans is a "unique aspect of ERISA"). Any development that would increase the cost of plan administration, including additional litigation costs, is at odds with the policy of encouraging employers to continue to provide retirement plans as a meaningful complement to the Social Security system for a substantial percentage of this country's current workers. *See Barrs v. Lockheed Martin Corp.*, 287 F.3d 202, 207-08 (1st Cir. 2002) ("increased burdens necessarily increase costs, discourage employers from offering plans, and reduce benefits to employees").

The increased cost of providing and obtaining fiduciary insurance is of particular concern in this context. *See* "Enron Debacle Causes Companies to Increase 401(k) Insurance." *Insure.com* (June 23, 2005) available at http://www.insure.com/business/ enron202.html; Jo Ann Abramson and David M. Gische, "The New Wave of Corporate Fiduciary Claims," American Bar Ass'n 33 Spring Brief 45 (2004) ("More problematic are the implications if these new ERISA claims are, in fact, successful [for insurers]. . . . [U]nderwriters, and the corporations they insure, need to respond now to the increased risk of exposure and costs that these lawsuits present"); Mark Casciari and Ian Morrison, *Should the Securities Exchange Act be the Sole Federal Remedy for an ERISA Fiduciary Misrepresentation of the Value of Public Employer Stock?* 39 J.Marshall L.Rev. 637, 656 (2006) (increased litigation against 401k plan sponsors will increase

the cost of fiduciary insurance and "increase the cost of providing benefits and thus may discourage employers from continuing to offer retirement plans or as generous retirement plans").

5. LaRue's effort to characterize his claim as providing a benefit to the Plan is hardly aided by his withdrawal from the Plan. Having cashed out, any recovery will clearly go directly to him: it cannot be funneled, even fictitiously, through an individual Plan account that no longer exists. LaRue recognizes the importance of this issue. In the district court, LaRue made much of the fact that he was (at that time) still a participant in the Plan, calling it an "important fact" for the district court to consider. BIO App. 44a. LaRue reiterated this point in the Fourth Circuit. In distinguishing the Eight Circuit's decision in *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir. 2005) that a past participant could not recover relief under § 502(a)(3), LaRue stated, "what is key in distinguishing the outcome in *Calhoon* from the matter *sub judice* is that *Calhoon* was *no longer a participant in the plan, but LaRue is*." Brief for Appellant in *LaRue v. Dewolff, Boberg & Assoc*, 450 F.3d 470 (4th Cir. 2006) No. 05-1756, 2004 WL 3545170, at *29 (emphasis in original).

To be sure, LaRue and his *amici* now argue that LaRue remains a "participant" in the Plan. They are wrong. This Court interpreted the term "participant" in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) to mean that a former plan participant may pursue a claim if it can be established that she has "a colorable claim" to "vested benefits." Some courts have applied *Firestone* to hold that former participants who have accepted lump sum distributions of their benefits may not maintain a claim under § 502(a)(2). See *Crawford v. Lamantia*, 34 F.3d 28 (1st Cir. 1994); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986) (*per curiam*) *cert. denied*, 479 U.S. 72 (1987). Other courts have applied a "but for" test and allowed former participants to

maintain a claim for benefits if it can be proven that plaintiffs would still be participants in the plan but for defendants' conduct. *See Swinney v. Gen. Motors Corp.*, 46 F.3d 512 (6th Cir. 1995); *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992); *Adamson v. Armco, Inc.*, 44 F.3d 650 (8th Cir. 1995); *In re Patterson Co., Inc. Securities Derivative & ERISA Litig.*, 479 F. Supp. 2d 1014, 1042-44 (D. Minn. 2007).[14] LaRue has no conceivable § 502(a)(2) claim under either test, as it is not even alleged that DeWolff had any role in LaRue's decision to cash out of the Plan two years after initiating this litigation.

The viability of LaRue's claim thus hinges on whether the remedy he seeks can be fairly characterized as a claim for benefits as opposed to a traditional claim for money damages. Some courts have put such claims in the former category, in cases where the alleged loss was caused by an intentional breach of fiduciary duty. Other courts have held that such claims seek damages that are not recoverable in an action brought under § 502(a)(1)(B). *See In re Patterson Companies*, 479 F. Supp. 2d 1014; *Evans v. Akers*, 466 F. Supp. 2d 371 (D. Mass. 2006), *appeal docketed*, No. 07-1140 (1st Cir. Jan. 22, 2007). The issue is currently pending before two other courts of appeals, as well as the First Circuit. *See Dickerson v. Feldman*, 426 F. Supp. 2d 130 (S.D.N.Y. 2006), *appeal docketed*, No. 06-1616 (2d Cir. Apr. 4, 2006); *Vaughn v. Bay Envtl. Mgmt. Inc.*, No. C03-5725, 2005 WL 2373718 (N.D. Cal. Sept. 26, 2005), *appeal docketed*, No. 05-17100

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[14] Plaintiffs in most of those cases proceed under § 502(a)(1)(B), which permits a participant to bring suit for benefits under the terms of the plan. Plaintiffs in other such cases have invoked § 502(a)(2). LaRue, of course, invoked neither.

(9th Cir. Nov. 1, 2005).[15] In part because LaRue did not proceed under § 502(a)(1)(B),[16] LaRue's claim is strictly for lost profits, and cannot be fairly characterized as a "colorable claim for vested benefits" within the meaning of *Firestone*.

6. The absence of a damages remedy for lost profits does not mean that LaRue lacked a remedy. Any failure to implement his instructions would give rise to a claim for swift and sure equitable relief: an injunction compelling the defendant to follow the instructions. LaRue claimed he gave instructions to change his investment allocations that, if honored, would have yielded substantial returns in the market. He claims the instructions were not followed—and two years later claims that he would have made a lot of money had the instructions been followed. But, even if true, LaRue was not without a remedy. If the plan administrator and/or its agents actually failed to follow his investment directions, a single telephone call to DeWolff should have prompted quick action. And, in the unlikely event there was further delay, an equitable claim to force the plan fiduciary to implement the investment requests would be straightforward.

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[15] The questions presented in cases like *Evans v. Akers* are antecedent to the questions on which *certiorari* was granted in this case. The Court may wish to await further developments in this area of the law before undertaking to resolve those issues.

[16] It is conceivable, as suggested by the ERISA Industry Committee (ERIC) as *amicus curiae* in support of Respondents, that LaRue could have filed a claim alleging a violation of § 502(a)(1)(B), seeking to "enforce his rights" under the terms of the plan. ERIC's *amicus* brief suggests that the second clause of § 502(a)(1)(B) may have been implicated by the conduct alleged here. Depending on the actual terms of the plan, a participant might be able to claim a right, under the terms of the plan, to have her investment instructions followed by the plan sponsor and/or a service provider to the plan. Moreover, had LaRue actually taken a distribution, he might have been able to pursue a claim for benefits under the terms of the plan, as provided in the first subsection of § 502(a)(1)(B). *Cf. Goeres v. Charles Schwab*, 220 Fed. Appx. 663 (9th Cir. 2007).

Because that is so, it is inconceivable that the order would not have been executed had LaRue simply picked up the telephone and called some-one.[17]

To create a claim for lost profits in this circumstance is to reward someone for not pursuing the claim for equitable relief Congress expressly stated is available here. Indeed, LaRue's argument in favor of a damages remedy could have the additional perverse consequence of making him ineligible for the equitable relief provided in § 502(a)(3), as the availability of a damages remedy is one of the traditional defenses to a claim for equitable relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

This Court can hold open the question whether an abject, purposeful failure to follow a clear instruction, following some pattern or practice, or based on some asserted policy potentially applicable to all plan participants, would give rise to a damages remedy. But it is clear enough that the kind of negligent failure to follow an individualized instruction in a single case, without more, cannot be regarded as creating "losses to the Plan" within the meaning of § 409.

C. LaRue's Theory Cannot be Reconciled with This Court's ERISA Jurisprudence

Affirmance is required for the independent reason that a ruling in favor of LaRue would fundamentally change the

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[17] In addition to bringing a claim under the second clause of § 502(a)(1)(B), it may also be that LaRue could have pursued a state law claim against the entity, unnamed in the complaint, allegedly responsible for not honoring his investment instructions. Such claims may not be preempted by ERISA. *See See Northcutt v. General Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006) (ERISA does not preempt claim based on contractual right); *Barker v. The Hartford Life and Acc. Ins. Co.*, 2007 WL 2192298 (N.D. Tex. July 31, 2007) (tort claim brought against insurance carrier, deemed not to be an ERISA fiduciary, not preempted). LaRue's failure to pursue such claims is nowhere explained.

assumptions that have guided the Court's ERISA preemption jurisprudence for more than thirty years. In *Pilot Life*, the Court struck down a state law providing a damages remedy for consumers who had been subject to unfair claims practices by insurers. *Pilot Life*, 481 U.S. 41. In numerous cases following *Pilot Life*, the Court has adopted an expansive reading of ERISA's preemption provisions. *See, e.g., Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990); *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999); *Metropolitan Life Ins., Co. v. Massachusetts*, 471 U.S. 724 (1985). In these cases, the Court has reemphasized that "Congress had not intended causes of action under ERISA itself beyond those specified in" Section 502. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 378 (2002). The Court in *Rush Prudential*, for example, expressly concluded that the Illinois statute at issue there was not preempted precisely because it did not "involve the sort of additional claim or remedy exemplified in *Pilot Life*." *Id.* at 380. This Court's unanimous decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) settled the question. The Court held that, when a state cause of action is not completely independent from an ERISA cause of action it is preempted, even if the elements of the state claim are not completely duplicative of the ERISA cause of action. *Id.* at 215.

The Court explained the analytical basis for ERISA preemption in *McClendon*. There the Court reasoned that the Texas wrongful termination statute at issue was preempted because it "purports to provide a remedy for the violation of a right expressly guaranteed by § 510 and exclusively enforced by § 502(a)." *McClendon*, 498 U.S. at 144. As the Court explained in *Rush Prudential*, in *McClendon* "we had no trouble finding that Texas's tort of wrongful discharge, turning on an employer's motivation to avoid paying pension benefits, conflicted with ERISA enforcement; while state law duplicated the elements of a claim available under ERISA, it converted the remedy from an equitable one under

§1132(a)(3) (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal)." *Rush Prudential*, 536 U.S. at 379.

The Court's preemption cases thus hinge on the heretofore settled understanding that state law tort claims are preempted precisely because they seek remedies not available under § 502, which is the exclusive vehicle for pursuing claims against plan sponsors and their service providers. The fact that ERISA provides no damages remedy for these kinds of claims against sponsors of medical and disability benefit plans reflects a long-shared understanding. Had it been otherwise, after all, there would have been no reason for plaintiffs' attorneys to frame their claims for damages in state law terms. It would be surprising to learn now, more than thirty years after the passage of ERISA, that they need not have been so creative because the very same remedies were available in ERISA itself all along. While some might welcome the discovery of such buried treasure, there is no indication Congress intended such an outcome.

The Court's preemption jurisprudence properly recognizes that the Congressional intent to encourage employers to continue to maintain welfare benefit plans would be undermined if plaintiffs could invoke common law or state statutory remedies to pursue damages and other remedies beyond those set forth in § 502(a). Those same concerns apply to sponsors of retirement plans, including defined contribution plans. It would be anomalous in the extreme to allow such claims to be brought directly against employer sponsors of 401k plans under either § 502(a)(2) or § 502(a)(3), when such claims are not available against the sponsors of ERISA welfare benefit plans.

II. THE FOURTH CIRCUIT'S CONCLUSION CONCERNING THE SCOPE OF APPROPRIATE EQUITABLE RELIEF UNDER SECTION 502(a)(3) SHOULD BE AFFIRMED

A. The Fourth Circuit Concluded Correctly that Petitioner Sought Compensatory Damages.

The Fourth Circuit concluded that LaRue's claim was foreclosed by this Court's decisions in *Mertens* and *Great-West*. Pet. App. 9a. *See also, Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477, 482 (6th Cir. 2001) ("ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries"); Muir, 81 Iowa L. Rev. at 44.

The Fourth Circuit's analysis and holding is consistent with the vast majority of lower courts that have interpreted *Mertens* and *Great-West* to preclude the recovery of compensatory damages under § 502(a)(3), irrespective of clever drafting by plaintiffs' lawyers. *Goeres v. Charles Schwab*, 220 Fed. Appx. 663 (9th Cir. 2007); *Todisco v. Verizon Communications, Inc.*, No. 06-1957, 2007 WL 2231733 (1st Cir. Aug. 6, 2007); *Green v. ExxonMobil*, 470 F.3d 415 (1st Cir. 2006); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); *Ramsey v. Formica Corp.*, 398 F.3d 421 (6th Cir. 2005) (request to enjoin employer from reducing monthly benefits considered legal relief) *cert. denied*, 546 U.S. 815 (2005); *Millsap v. McDonnel Douglas*, 368 F.3d 1246 (10th Cir. 2004) (back-pay in a § 510 case is not equitable relief); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 945 (8th Cir. 1999); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (Section 502(a)(3) precludes recovery of monetary damages from a fiduciary); *In re Boston Scientific Corp.*, No. 06-10105-JLT, 2007 WL 2412164 (D. Mass. Aug. 27, 2007); *Wharton v. Duke Realty, LLP*, 467 F. Supp. 2d 381 (S.D.N.Y. 2006); *Pfahler v. National Latex Co.*, 405 F. Supp. 2d 839 (N.D. Ohio 2005). As the court in *Callery v. U.S. Life*, 392

F.3d 401, 409 (10th Cir. 2004) *cert. denied*, 546 U.S. 812 (2005) explained, the Supreme Court has given "rather emphatic guidance" that compensatory damages are not available under § 502(a)(3).

Irrespective of his characterization of the claim as seeking "make whole relief,"[18] LaRue's claim is a classic iteration of a legal claim for compensatory damages. It is measured by his alleged loss of potential market gains, rather than any gain alleged to have been achieved by either DeWolff or the Plan. The nature of the alleged loss—lost profits—is a quintessential damages remedy. *Terry*, 494 U.S. at 573 ("the money damages [of backpay] respondents seek are the type of relief traditionally awarded by courts of law"). And LaRue's claim bears no relationship to the kinds of claims typically regarded as equitable. The complaint did not seek any "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *See Mertens*, 508 U.S. at 256. LaRue made no claim that can be characterized as equitable restitution. And there is no basis on which he could claim a constructive trust or an equitable lien.

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[18] LaRue admitted in the district court that the complaint sought compensatory damages in excess of what he claimed to be his actual loss. In the briefing on Respondents' motion for judgment on the pleadings, LaRue conceded: "Although the Defendants reference in their brief a figure of $150,000.00 which is contained in Plaintiff's complaint, that figure was intended to merely orient the court as to what Plaintiff believed the breach of fiduciary duty cost him at the time he filed the complaint." BIO App. 47a. LaRue acknowledged that his expert had calculated his claim for lost profits "at a little less than $100,000." *Id.* LaRue made no attempt to amend the complaint. This concession reveals that LaRue's § 502(a)(3) claim improperly seeks compensatory damages unavailable under § 502(a)(3), even if it can be presumed that some sort of make-whole relief is available after *Mertens* and *Great-West*. *See Millsap v. McDonnell Douglas*, 368 F.3d at 1260 ("the remedial purpose of § 502(a) is not to make the aggrieved employee whole") (citing *Mertens*, 508 U.S. at 253 and *Russell*, 473 U.S. at 138).

Indeed, LaRue and his *amici* effectively concede that his § 502(a)(3) claim is foreclosed by *Mertens* and *Great-West*. Pet. Br. 30. This is why they take the extraordinary step of asking the Court to overrule *Mertens*. Pet. Br. 40 n.26; Nat'l Emp. Lawyers Ass'n, Br. 15. But *Mertens* was correctly decided: When Congress invokes equitable remedies, it distinguishes them from legal remedies. Generally they do not overlap. And because the relief sought here is easily recognizable as legal, it simply cannot be re-characterized as equitable.

B. Petitioner's Argument that Surcharge was Typically Available in Equity is Without Merit.

The principal argument made by Petitioner and his *amici*—that LaRue should be permitted to pursue a claim for lost profits here because in 18th century England a common law trustee could be "surcharged" so that a plaintiff could receive money damages in equity—does not withstand analysis. This Court has already made clear that when Congress referred to equitable remedies in ERISA, Congress was referring to the range of remedies that are presently understood to involve "equitable relief," as opposed to remedies at law, *i.e.* damages. *Mertens*, 508 U.S. at 256. The origins of the distinction between equitable remedies and legal remedies are derived from the different types of remedies customarily available to the different branches of the divided bench. But we no longer have a divided bench. And when Congress in ERISA refers to legal versus equitable remedies, it means those remedies that are customarily regarded as legal versus those that are customarily regarded as equitable when exercised by the federal courts to which Congress assigned jurisdiction over ERISA claims. There really is no question but that the lost profits sought here are, in every ordinary modern use of the term, damages.

To this, Petitioner and his *amici* respond that all suits against trustees were historically equitable, and therefore, if

the remedy is available against the trustee, it must be an equitable remedy. But we know this not to be the case under ERISA because Congress did indeed establish what are clearly damages remedies against trustees in certain circumstances. *See* 29 U.S.C. §§ 1132(g)(2)(E), 1451(a)(1), 1024(a)(5)(C) and 1303(e)(1). And there is no basis for the suggestion that remedies are somehow equitable merely because each and every claim available against a trustee is equitable. Under LaRue's theory, for instance, there would have been no need for § 502(a), because almost everything under the sun might be available under § 502(a)(3). In *Mertens*, this Court expressly rejected the notion that any remedy available against the trustee, such as remedies available in equity under the heading of the "clean-up doctrine," should be regarded as an appropriate equitable remedy under § 502(a)(3). *Mertens*, 508 U.S. at 257-58.[19] That there were many reasons why historic courts of equity would seek to expand their powers to include classical legal remedies—often to avoid multiple proceedings in order to provide relatively complete relief—is not surprising. But that hardly changes the modern understanding of the fundamental difference between legal and equitable remedies. Claims for damages were "peculiarly within the province of the law courts." *Millsap v. McDonnell Douglass*, 368 F.3d. 1246, 1254 (10th Cir. 2004), (citing *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710-11 (1999)).

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[19] Lower courts have faithfully followed *Mertens*, recognizing that one cannot simply re-label a claim for money damages as "surcharge" and thereby make it an appropriate equitable remedy in an ERISA case. *Knieriem v. Group Health Plan*, 434 F.3d 1058, 1064 (8th Cir. 2006) (rejecting claim for money damages on both surcharge and restitution theories); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006) (rejecting the notion that artful pleading will permit the transformation of freestanding claim for money damages into one for equitable relief); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 612 (S.D. Tex. 2003) ("'Make-whole' relief for a claim of breach of fiduciary duty by a trustee cannot cloak a claim for compensatory damages").

Moreover, LaRue and his *amici* exaggerate in suggesting that surcharge was a typical remedy available against a trustee, and would have been available in a case like this. There is scant historical authority to support the assertion that surcharge was available in a case, like this one, involving no actual out-of-pocket losses by the plaintiff. The authorities cited by LaRue describe surcharge as a discretionary remedy intended to provide a plaintiff with an award of monetary relief from a trustee to compensate the plaintiff for losses actually sustained as a result of the trustee's breach of duty. 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 205, at 237 (4th ed. 1987) ("When the trustee commits a breach of trust, the beneficiary . . . can charge the trustee with any loss that resulted"); Restatement (Second) of Trusts § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with . . . any loss or depreciation in value of the trust estate resulting from the breach of trust").

The sum total of LaRue's argument that surcharge was typically available in equity in a case of lost profits caused by a ministerial mistake is a citation to a comment in the Restatement of Trusts and a 1937 decision by a New Jersey court, *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937). (Pet. Br. 34; U.S. Br. 19).[20] Yet *Gates* hardly supports the notion advanced by LaRue. The lower court opinion in *Gates* explains that the "improper investments" alluded to by the appellate court involved self-dealing by the trustee. The defendant trust company in *Gates* had been investing trust funds in a mortgage company in which the trustee had a considerable financial interest. The trust company had acquired 51 percent of the capital stock of the mortgage company and

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[20] LaRue's additional authorities are *dicta* from decisions that either do not actually analyze surcharge, or are inapposite. For example, in *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), "The contentions are solely as to administration and restoration of corpus." *Id.* at 467. The Court did not surcharge, or even analyze whether it could surcharge, the trustees in that case.

many of the trust company's own officers and directors served as officers and directors of the mortgage company. *Gates*, 191 A. 304, 316 (N.J. Ch. 1937), *aff'd*, 194 A. 65 (N.J. 1937). Thus, the improper investments leading to a loss in this case involved self-dealing and conflicts of interest. *Gates* thus illustrates the historical reality that surcharge was often granted in cases where the trustee had obtained ill-gotten gains through self-dealing or other affirmative misconduct, or other situations where traditional equitable restitution was appropriate.

Other authority suggests that LaRue overstates the point. For example, LaRue cites *Mosser v. Darrow*, 341 U.S. 267 (1951) for the proposition that surcharge functions as a sanction as well as a form of compensation. In that case, the Court held that surcharge was appropriate where a trustee intentionally approved self-dealing by his agents, allowing them to trade the trust's securities in companies in which they had interests. *Id.* at 269. The Court found that the trustee's actions were "willful and deliberate," and that the self-dealing was forbidden. *Id.* at 272. The Court explained, "that which the trustee had no right to do he had no right to authorize, and that the transactions were as forbidden for benefit of others as they would have been on behalf of the trustee himself." *Id.* at 272.[21]

The authorities do confirm that claims of these types were brought in a court of equity: "Such damages were available only in courts of equity because those courts had exclusive

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[21] LaRue also cites the Restatement of Trusts § 205 cmtg. Yet this comment confirms that LaRue and his *amici* exaggerate the proposition that surcharge was a common practice in the days of the divided bench. The comment simply states that a court in equity may excuse a trustee from liability when that trustee has not acted in bad faith. In this instance, LaRue does not assert that Respondents acted in bad faith, or even with "supine negligence." *Mosser*, 341 U.S. 272. Thus, the Restatement contemplates that which is evident in *Gates* and *Mosser*: surcharge was generally available only when the trustee acted in bad faith.

jurisdiction over actions involving a trustee's breach of his fiduciary duties," regardless of the characterization of the damages. *Terry*, 494 U.S. at 571, n.8. In this way, surcharge is similar in origin to the clean-up doctrine: both served as vehicles that allowed courts of equity to award legal remedies in particular circumstances. The fact that a court of equity was empowered to award monetary relief, however, does not transform the remedy from legal relief to equitable. A monetary award may be characterized as an equitable remedy if it is found to be an action for disgorgement of improper profits or "incidental to or intertwined with injunctive relief." *Terry*, 494 U.S. at 571. Because LaRue does not allege that defendants have been unjustly enriched, nor does he bring the claim for monetary damages as a claim appurtenant to an equitable claim, LaRue's claim is legal in nature. As the Court in *Terry* held, because "the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal." *Id.* at 570.

LaRue's summary of the relief available in 18th century England thus by no means establishes that surcharge was "typically available" in equity.[22] To the contrary, it confirms that a damages remedy was the exception to the general rule that claims for monetary relief were brought exclusively in the law courts and were not "typically available" in equity. That there is some authority for the notion that the chancellor

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[22] LaRue's surcharge argument is further weakened by the inconvenient (to him) historical reality that a claim in equity is subject to all equitable defenses, including laches. LaRue's principal authority on this point thus recognizes: "The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable." Restatement (Second) Trusts § 219. LaRue's decision to wait suggests that the chancellor would have "done equity" and dismissed a claim for surcharge on the basis of laches.

may have been empowered to award monetary relief against a trustee under the label of surcharge hardly makes it typical. By definition, a remedy that is available on occasion is not "typical."

In this context, the Court's delineation in *Mertens* of the remedies typically available in equity, 568 U.S. at 256, is an accurate taxonomy of claims followed in the days of the divided bench. Moreover, this Court has acknowledged that "trust law does not tell the entire story" in cases of ERISA statutory interpretation. *Varity*, 516 U.S. at 497. The Court has reminded the lower courts to "apply common-law trust standards 'bearing in mind the special nature and purpose of employee benefit plans.'" *Varity*, 516 U.S. at 506 (quoting H.R. Conf. Rep. No. 93-1280 at 302, 3 Leg. His. 4569). As one court has observed, "[o]rdinary trust principles cannot be transferred wholesale, and, where ERISA itself specifies [the requirement], courts must be especially cautious in creating additional ones." *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202, 207 (1st Cir. 2002). *See Callery*, 392 F.3d at 405-06; *Moore v. Amer. Fed. of Television & Radio Artists*, 216 F.3d 1236, 1244 n.17 (11th Cir. 2000) ("[W]hile it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts. A method of interpretation consonant with this realization will reject the unselective incorporation of trust law rules into ERISA"). However one comes out after rummaging "through dusty attics of ancient writs," *Terry*, 494 U.S. at 575 (Brennan, J. concurring) LaRue suggests no basis for reversing *Mertens* and *Great-West* and authorizing a new species of damages remedies.

The very effort LaRue makes to distinguish surcharge from damages shows how hard it would be to accommodate this claim within the ERISA framework. LaRue asserts that surcharge is uniquely equitable because it was entirely discretionary. Outside of the classic area of injunctive relief, such discretionary remedies do not translate well to our modern

scheme of jurisprudence. Modern judges understand that a claim for damages is, unlike a request for injunctive relief, inherently obligatory—the plaintiff proves up her claim and recovers the damages to which she is entitled.[23] The notion that money remedies are discretionary does not fit well within that scheme. Congress could not have easily intended the marginal power of the chancellor to provide for a specific equitable remedy to be imported wholesale into the 20th (and now 21st) century. There surely is no indication Congress has yet intended ERISA to encompass a whole new jurisprudence of discretionary damages remedies against sponsors of 401k plans.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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September 11, 2007

[23] LaRue is surely hoping for an obligatory remedy here, with damages awarded in the full amount permitted by the evidence he would adduce at trial. And, if LaRue were allowed to replead his case and start over, he, and others like him, would surely seek to bring damages claims before a jury, with a Seventh Amendment-based argument that ERISA claims for legal damages are to be tried to a jury. The argument has already been made in the lower courts. *See Ellis v. Rycenga Homes, Inc.*, 2007 WL 1032367 (W.D. Mich. Apr. 2, 2007); *Spano v. Boeing Co.*, 2007 WL 1149192 (S.D. Ill., Apr. 18, 2007); *Abbott v. Lockheed Martin Corp.*, 2007 WL 2316481 (S.D. Ill., Aug. 13, 2007). This Court should reject LaRue's implication and confirm the reasoning in *Mertens* that § 502(a) is not intended to permit ERISA plaintiffs to bring claims for damages before juries.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Charleston Division

Civil Action No. 2:04-1747-18

JAMES LARUE,

Plaintiff,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., AND DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN,

Defendants.

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

For their Answer to Plaintiffs Complaint, Defendants DeWolff, Boberg & Associates, Inc. ("DBA") and DeWolff, Boberg & Associates Employees' Savings Plan ("DBA Savings Plan"), by counsel, make the following statements and raise the following defenses:

Answering specifically the allegations contained in the numbered paragraphs of the Complaint:

1. Defendants admit the allegations of Paragraph I.

2. Defendants admit that DBA is a corporate entity organized under the laws of the State of South Carolina with its principal place of business in Richardson, Texas. Defendants further admit that DBA does business in Charleston, South Carolina. Defendants deny the remaining allegations of Paragraph II.

3. Paragraph III states a legal conclusion which requires no response. To the extent a response is required, Defendants admit that Defendant DBA Savings Plan is a retirement plan subject to regulation under ERISA.

4. Paragraph IV states a legal conclusion to which no response is required.

5. Defendants admit that Exhibit A to Plaintiffs complaint is the Summary Plan Description for the DBA Savings Plan that was issued in January 2002. Defendants admit that Defendant DBA Savings Plan is a retirement plan subject to regulation under ERISA in which certain former and current DBA employees participate. Defendants deny the remaining allegations of Paragraph V.

6. Defendants admit the allegations of Paragraph VI.

7. Defendants admit that Plaintiff is a participant in the DBA Savings Plan and has participated in the Plan since 1993. Defendants deny the remaining allegations of Paragraph VII.

8. Defendants admit that participants in the DBA Savings Plan are permitted to direct the investment of their contributions to the Plan in accordance with the procedures and requirements established by the Plan Administrator or its agents. Defendants deny the remaining allegations of Paragraph VIII.

9. Defendants admit that in 2001 Plaintiff requested that certain changes be made with respect to his then-current and future investments in the DBA Savings Plan. Defendants further admit that Plaintiff subsequently rescinded his request that such changes be implemented. Defendants deny the remaining allegations of Paragraph IX.

10. Defendants deny the allegations of Paragraph X.

11. The allegations of Paragraph XI state a legal conclusion to which no response is required. To the extent a re

sponse is required, Defendants deny the allegations of Paragraph XI.

FIRST CAUSE OF ACTION

12. Defendants incorporate by reference their responses to Paragraphs I through XI.

13. Defendants admit that DBA is the Administrator, and as such, a fiduciary of the DBA Savings Plan. Defendants admit that Defendant DBA is responsible for fulfilling the obligations of an administrator as they are defined under the DBA Savings Plan. Defendants deny the remaining allegations of Paragraph XIII.

14. Defendants deny the allegations of Paragraph XIV.

15. Defendants deny the allegations of Paragraph XVIII.

16. Defendants deny each and every allegation in the Complaint not specifically admitted herein.

17. Plaintiffs prayer for relief requires no response. To the extent a response is required, Defendants deny that Plaintiff is entitled to any relief whatsoever.

For A First Affirmative Defense

Plaintiffs Complaint fails to state a claim upon which relief can be granted.

For A Second Affirmative Defense

Plaintiffs claims are barred, in whole or part, by his failure to exhaust his administrative remedies.

For A Third Affirmative Defense

Plaintiffs claims are barred, in whole or part, by the doctrine of unclean hands and/or other equitable doctrines.

For A Fourth Affirmative Defense

At all relevant times to this action, Defendants acted with due care and complied with applicable statutory, regulatory and common law requirements.

For A Fifth Affirmative Defense

Plaintiffs Complaint fails, in whole or in part, because Plaintiff has waived the right, if any, to pursue his claims by reason of his own actions or course of conduct.

For A Sixth Affirmative Defense

Plaintiff has failed to mitigate his damages, if any, as required by law.

For A Seventh Affirmative Defense

Plaintiffs Complaint is barred, in whole or part, by the statute of limitations.

Respectfully submitted,

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July 19, 2004

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No. 06-856

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IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

I. SECTION 502(A)(2) OF ERISA AUTHORIZES PETITIONER TO SEEK RESTORATION OF PLAN LOSSES CAUSED BY FIDUCIARY BREACH

The Fourth Circuit erred in holding that the relief sought by petitioner is not available under section 502(a)(2) of ERISA. As explained below, respondents and their *amici* cannot dispute that the text of sections 502(a)(2) and 409 of ERISA plainly authorizes the relief at issue in this case. See Section I.A., *infra*. Indeed, respondents and their *amici* labor mightily to persuade this Court to ignore the plain text of the statute by misrepresenting the position of petitioner and the United States; see Section I.B., *infra*, by mischaracterizing this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), see Section I.C., *infra*, and by advancing baseless reasons to affirm the judgment on alternative grounds; see Section I.D., *infra*. Once this brushwood is swept aside, it is quite clear that petitioner is seeking the restoration of "losses to the [DeWolff] plan" as permitted by section 502(a)(2) of ERISA. As such, the judgment of the court of appeals must be reversed.

A. The Relief Sought by Petitioner Is Authorized By the Plain Text of 502(a)(2) and 409 of ERISA

Section 502(a)(2) of ERISA authorizes a retirement plan participant to sue a plan fiduciary to restore "any losses to the plan resulting from [fiduciary] breach." 29 U.S.C. 1132(a)(2) (cross-referencing 29 U.S.C. 1109 which contains the language quoted above). The first question on which this Court has granted certiorari is:

> Does § 502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?

Pet. i. The resolution of this question turns entirely on the meaning of "any losses to the plan" in the context of a defined contribution retirement plan such as the 40(k) plan involved in this case.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, [] the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[W]here the statutory language provides a clear answer, it ends there as well."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there.")

The plain meaning of "any losses to the plan" necessarily includes any diminution in value of a plan's total assets. Pet. Br. 17. Unsurprisingly, this uncontroversial proposition is never contested by respondents or any of their *amici*. Such acquiescence is important because, as explained at length in petitioner's opening brief, the funds allocated to every individual account in a 401(k) plan are, by definition, assets of the plan. *Id.* at 17-19. In this case, the total value of the assets held by the DeWolff Plan decreased as a result of the fiduciary breach alleged by petitioner. *Id.* at 20. As such, petitioner has properly alleged that respondents' fiduciary breach has caused "losses to the plan."[1] The plain text of ERISA requires nothing more.[2]

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[1] The procedure for restoration of plan losses after a successful 502(a)(2) action is discussed by Law Professor *amici*. See Law. Prof. Br. 12-14.

[2] Nor does common sense. If a hypothetical plan had 10 individual account holders, each having $10 allocated to their individual accounts, the plan's assets would total $100. If a fiduciary breach resulted in the plan having $90 in total assets, those lost ten dollars would be "plan losses." Whether the ten dollars in losses reduced all ten accounts to $9 or one

Cornered by ERISA's explicit terms, respondents and their *amici* attempt to edit—rather than propose an alternative interpretation of—the relevant statutory language. Specifically, respondents argue that petitioner has not sought to recover "losses to the plan" because he did not allege that "the interest of any other participant in the Plan was affected by the fiduciary breach asserted." Resp. Br. 16. Few, if any, litigation positions run so directly contrary to the simple text of a statute. ERISA *nowhere* requires that plan losses must affect more than one participant. To the contrary, the statute makes clear that "*any*" plan losses will do. See, *e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5, 9 (1997) (noting that when Congress uses the word "any," there is "no room to speculate about congressional intent" because "[r]ead naturally, the word 'any' has an expansive meaning that is '*one* or some indiscriminately of whatever kind.'" (quoting *Webster's Third New International Dictionary* 97 (1976) (emphasis added)). As petitioner explained in his opening brief, respondents urge this court to read section 502(a)(2) as requiring "any losses to the plan *but only if such losses affect some unspecified number of plan participants that is greater than one*." Pet. Br. 22 (emphasis added). But that is not what the statute says. Nor would it have been difficult to express if that were Congress' intention.[3]

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account to $0 does not somehow change the fact that *the plan* suffered ten dollars in losses.

[3] Respondents also maintain that the violation of an "individual duty" is not remediable under section 502(a)(2). See Resp. Br. 19 (arguing that petitioner is not entitled to relief under section 502(a)(2) because "there is no allegation [in this case] of any breach of duty to the Plan in any meaningful sense"). As with their "individual loss" argument, respondents' "individual duty" claim is foreclosed by the unambiguous text of ERISA. See 29 U.S.C. 1109(a) (imposing personal liability on a fiduciary "who breaches *any* of the responsibilities, obligations, or duties imposed upon fiduciaries by this title.") (emphasis added). The statute includes no exception for fiduciary breaches that harm only one or some small number of participants. See U.S. Br. 10-12. In any event, a duty to follow investment instructions—which necessarily involves plan assets—is properly

Respondents' only other attempt to confront the text of sections 502(a)(2) and 409 of the statute is the curious suggestion that petitioner has alleged "lost profits" but not "losses." Resp. Br. 12. In essence, respondents distinguish (1) "decline-loss," *i.e.*, any loss attributable to an actual decline in the value of an asset from (2) "appreciation-loss," *i.e.*, any loss attributable to unrealized asset appreciation. Respondents then urge this Court to interpret the word "losses" in the phrase "losses to the plan" so as to encompass the former but *not* the latter. There is absolutely no basis for such an interpretation. The plain meaning of the phrase "losses to the plan" is not limited to only certain *types* of plan losses. Nor do sections 502(a)(2) and 409 of ERISA give any indication whatsoever that "lost profits" are not compensable "losses" under the statute. This is true for good reason. Imagine, for example, that a fiduciary promised to invest all plan assets in a combination of stocks and bonds, but instead put all such assets in a non-interest bearing savings account. Under respondents' theory, even if *every single participant* in the plan were affected by such imprudence, there would be no available relief under section 502(a)(2) because no participant would have suffered "losses." Of course, there is no evidence—textual or otherwise—that Congress intended such an absurd result.[4]

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conceived of as a duty owed *to the plan*. See Pet. Br. 23-24; Law Prof. Br. 7-9.

[4] In any event, petitioner *did* allege decline-loss in his complaint. See 310 App. 3a (alleging that "Plaintiff's interest in the plan has been *depleted* approximately $150,000") (emphasis added). Depleted, in the ordinary sense of the term, means that the described subject actually declined in value. See, *e.g.*, *Webster's Third International Dictionary* 605 (1981) (defining "to deplete" as "to lessen in number, quantity, significant content, or force in vital power or value as a result of such lessening").

B. Respondents Seek to Avoid the Plain Text of 502(a)(2) and 409 of ERISA by Misrepresenting the Position of Petitioner and the United States

Having misread ERISA's text, respondents and their *amici* next misread petitioner's brief, accusing petitioner and the United States of urging that "any losses incurred by an individual participant in the plan" are remediable under section 502(a)(2). Resp. Br. 16. Respondents are confused. The position urged by petitioner and by the United States is that *plan losses that affect an individual* are remediable, because "any" plan losses are remediable. The position urged by petitioner and by the United States is *not* that "any losses incurred by an individual participant" are remediable. The latter is a straw man propped up by respondents and their *amici* to avoid the actual 502(a)(2) Question. To be clear: fiduciary breaches often result in "losses incurred by an individual" that are *not* plan losses, and thus not compensable under section 502(a)(2). For example, fiduciary breaches may cause pain and suffering,[5] negative tax consequences,[6] or the forfeiture of a right to a defined benefit.[7] The foregoing are all "losses incurred by an individual," but not "plan losses that affect an individual." These examples serve to

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[5] *Russell, supra*, extensively discussed in petitioner's opening brief, is one such example. See Pet. Br. 24-27. The plaintiff in *Russell* expressly acknowledged that she was seeking relief for individual injuries (*i.e.*, pain and suffering) that occurred outside of the plan. *Id.* at 25. Indeed, in the welfare plan context, fiduciary breach often results in individual (but *not* plan) "losses." *Id.* at 25 n.17.

[6] See, *e.g.*, *Farr v. U.S. West Commc'ns, Inc.*, 151 F.3d 908 (CA9 1998) (plan participants incurred additional personal taxes when plan fiduciaries knowingly withheld information regarding material tax consequences).

[7] See, *e.g.*, *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (CA10 2004) (participant unable to collect proceeds upon death of spouse because fiduciary failed to inform participant of eligibility conditions for life insurance policy), cert. denied, 546 U.S. 812 (2005).

illustrate the clear difference between the position advanced by petitioner and respondents' straw man.[8]

C. Respondents Seek to Avoid the Plain Text of 502(a)(2) and 409 by Mischaracterizing *Russell*

Respondents and their *amici* argue or intimate that this Court *already* decided in *Russell*, *supra*, that losses suffered by one individual are not plan losses for purposes of section 502(a)(2). See, *e.g.*, Resp. Br. 6 (claiming that "LaRue and his *amici* ask the Court to reconsider its decision in * * * *Russell*"). As explained at length in petitioner's opening brief, however, respondents grossly misread *Russell*. Pet. Br. 24-29. In particular, what respondents and their *amici* fundamentally misunderstand is the fact that *Russell* presented a factual situation that had *absolutely nothing to do with plan losses*. The plaintiff in that case, Mrs. Russell, was seeking extra-contractual damages which allegedly resulted from a denial of disability benefits. Those alleged damages caused a personal "loss" to Mrs. Russell; however, they did not reduce the total assets held by the plan. As such, Mrs. Russell was not seeking to recover *plan* losses.[9]

Because *Russell* did not involve so much as an *allegation* of plan losses, this Court did not address the issue presented in this case. Contrary to the suggestion of respondents and their *amici*, this Court did not hold or suggest in *Russell* that a decrease in the value of plan assets fails to constitute a plan loss if it affects only one plan participant. Put another way: Mrs. Russell was not prevented from seeking extra-

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[8] Respondents mistakenly suggest that the United States has changed its position regarding what constitutes "losses to the plan" under section 502(a)(2) of ERISA. Resp. Br. 17 n.6 ("The Government makes no attempt to explain its change of position."). This erroneous assertion is entirely the result of respondents' mischaracterization of the position asserted by the United States in *this* case.

[9] Nor did Mrs. Russell seek to restore to the plan "any profits of [the] fiduciary which ha[d] been made through use of assets of the plan by the fiduciary." 29 U.S.C. 1109(a).

contractual damages because she was the only person affected by the alleged fiduciary breach. She was prevented from seeking such damages *because they are not losses to the plan.* The interpretation advanced by respondents, *i.e.*, that *Russell* somehow turns on *how many* participants are affected rather than the *type* of damages suffered, completely misses the mark. There can be little, if any, doubt that this Court's construction of section 502(a)(2) would have been no different in *Russell* if the alleged extra-contractual damages had affected 20, 200, or 2000 plan participants or beneficiaries.[10]

D. Respondents and Their *Amici* Seek to Avoid the 502(a)(2) Question Entirely By Asserting Baseless Alternative Grounds for Affirmance

This Court does not generally address alternative grounds for affirmance that are not subsumed within the questions on which certiorari has been granted. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 204 (2001) ("[Respondent] makes various arguments for alternative grounds to affirm the Court of Appeals. * * * As a general rule[, however,] we do not decide issues outside the questions presented by the petition for certiorari.") (citations omitted); *West v. Gibson*, 527 U.S. 212, 223 (1999) ("Respondent asks us to affirm on alternative grounds the Seventh Circuit's judgment. * * * These matters fall outside the scope of the question presented in the [] petition for certiorari. We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if

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[10] This case would be governed by *Russell* if petitioner were seeking personally to recover non-plan damages that he incurred as a result of fiduciary breach. For example, assume that petitioner had alleged that he suffered from a medical condition that had deteriorated because his depleted 401(k) account deprived him of the wherewithal to afford proper treatment and that he sought damages associated with his worsened medical condition. In such a case, petitioner would not be entitled to relief under section 502(a)(2) because the worsening of a medical condition is not a loss to the plan.

so, decide them.") (citation omitted).[11] Despite this fact, respondents and their *amici* devote much of their briefs to three new arguments in favor of affirmance, *none* of which is subsumed within the two questions on which this Court has granted certiorari. Even if the Court wishes to address these new arguments, however, none provides a legitimate basis on which to affirm the judgment of the Fourth Circuit.

1. **The claim that petitioner waived his right to proceed under 502(a)(2) is erroneous and, in any event, should be addressed on remand**

One of respondents' *amici* urges this Court to affirm the judgment of the Fourth Circuit on the ground that petitioner waived his right to proceed under section 502(a)(2) of ERISA by failing to expressly mention this subsection of the statute in his complaint. See Chamber Br. at 3 ("The threshold reason that the Court should affirm the judgment of the Court of Appeals is that the Complaint does not even place at issue ERISA Section 502(a)(2)."). For clarity, petitioner will refer to this as the "502(a)(2) Waiver Argument."

As an initial matter, there is no reason for this Court to reach the 502(a)(2) Waiver Argument. The allegation of waiver presents no obstacle to the resolution of the 502(a)(2) Question by this Court. See, *e.g.*, U.S. CVSG Br. 13 n.2; Law Prof. Pet. Br. 15; Cert. Reply 2 n.2. Moreover, the 502(a)(2) Waiver Argument was not advanced by respondents in their Brief in Opposition and, as such, has not been

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[11] This is particularly true when such alternative grounds have not been presented in a counterstatement of the questions presented, see *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 281 (1993) (acknowledging that former S. Ct. R. 24.2—now R. 15.2—"giv[es] respondents the right, in their brief in opposition, to restate the questions presented"), or in a conditional cross-petition, see *Atkins v. Parker*, 472 U.S. 115, 123 (1985) (holding that cross-petition procedures exist in order to permit parties who may be drawn into an appellate proceeding to seek to expand a judgment in their favor).

fully briefed before this Court.[12] Put simply, it is more appropriate for this issue to be litigated on remand should petitioner obtain reversal. Should the Court choose to address the issue, however, it should reject the 502(a)(2) Waiver Argument because it is wrong to suggest that petitioner did not "place at issue ERISA Section 502(a)(2)." The Federal Rules of Civil Procedure have made it "clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief" in the complaint. 5 Fed. Prac. & Proc. Civ. 3d § 1219 (2007) (Statement of the Claim—Theory of the Pleadings Doctrine). Rather, a plaintiff must merely put defendants on notice as to the allegedly wrongful conduct about which the plaintiff is complaining and the relief sought. Fed. R. Civ. Pro. 8. In this case, there can be no doubt that respondents were put on notice of petitioner's substantive claim (*i.e.*, that respondents' failure to follow petitioner's instructions constituted a breach of fiduciary duty). See BIO App. 2a-5a (petitioner's complaint at para IV, IX, XI, and XVIII). Similarly, there can be no doubt that respondents were put on notice regarding the specific relief sought by petitioner. See Pet. Br. 11 n.9.[13]

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[12] Even in their merits brief, respondents do not advance this argument as an alternative grounds for affirmance of the judgment.

[13] Even if petitioner had failed to identify section 502(a)(2) of ERISA as his basis for recovery, such omission would not be fatal. As this Court noted in a similar circumstance:

> [Respondent] asserts that petitioners waived this theory [regarding 502(a)(3) of ERISA] by neglecting to present it to the courts below. According to [respondent], petitioners' claim (until their merits brief in this Court) has been that [respondent] may be sued under 502(a)(3) only because [respondent] "violated" 406(a). But, even assuming that petitioners did not pellucidly articulate this theory before the Seventh Circuit, it appears to us that the Seventh Circuit understood the tenor of the argument.

Harris Trust v. Salomon Smith Barney, Inc., 530 U.S. 238, 245 n.2 (2000). In this case, petitioner did not fail to reference section 502(a)(2) in identi-

2. The claim that petitioner did not properly plead fiduciary breach is erroneous and, in any event, should be addressed on remand

Respondents and their *amici* repeatedly suggest that petitioner has not sufficiently pled a fiduciary breach. See, *e.g.*, Resp. Br. 19-20 n.9 ("There is a substantial question as to whether LaRue even pled a valid cause of action for breach of fiduciary duty"); Chamber Br. 8-9 ("There is another pleading deficiency in Petitioner's Complaint * * * [T]here are no allegations of fact showing *why* [either respondent] is a 'fiduciary' as that term is defined in ERISA."). For clarity, petitioner will refer to this argument as "the Fiduciary Pleading Argument." As with the 502(a)(2) Waiver Argument discussed in Section I.D.1., *supra*, respondents advance the Fiduciary Pleading Argument in the hopes that this Court will affirm the judgment of the Fourth Circuit on alternative grounds. This Court should decline such an invitation.

As an initial matter, the Fiduciary Pleading Argument is substantively without merit. ERISA requires a fiduciary to act with "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). No prudent fiduciary would ignore instructions from a participant or beneficiary regarding the investment of funds.[14] Ignoring

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fying the relief that he sought. See also BIO App. 47a (petitioner's reply to respondents' motion to dismiss) (quoting and describing the precise statutory language at issue in the 502(a)(2) Question as "legally, exactly on point").

[14] See, *e.g.*, *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (CA9 1983) (alleging breach of fiduciary duty under section 502(a)(2) for failure to investigate investments and noting that "the source for the prudent person test set forth in [ERISA] is the prudent person test as developed in the common law of trusts."). As the Restatement of Trusts itself makes clear:

instructions obviously violates the ERISA-imposed fiduciary duties of care and diligence.

In any event, the Fiduciary Pleading Argument is procedurally unsound. The argument does not present a valid ground on which to affirm the Fourth Circuit's judgment because such affirmance will afford respondents relief (*i.e.*, dismissal of petitioner's complaint *with prejudice*) that would not have been available to them in the lower courts. Respondents chose *not* to move for judgment on the pleadings based on the Fiduciary Pleading Argument. As such, the argument was never addressed by the lower courts. See, *e.g.*, Pet. App. 16a (where the Fourth Circuit noted that "[a]ccepting the allegations as pled, as we must, we shall assume without deciding that defendants' alleged conduct amounted to a breach of their fiduciary duties"). If respondents had asserted (and the district court had accepted) this argument, petitioner would undoubtedly have been granted leave to amend. Of course, respondents will have the opportunity on remand to move for summary judgment on the ground that they are not fiduciaries or did not commit fiduciary breach. But such non-pleading issues are not before this Court.

3. The claim that petitioner could, and should, have proceeded under 502(a)(1) is baseless

One of respondents' *amici* argues that petitioner could have brought his claim under section 502(a)(1)(B) of ERISA and that, as such, any claim under sections 502(a)(2) or 502(a)(3) is barred. ERIC Br. 6-7. Tellingly, respondents' *amici* does not cite *a single case* that has endorsed its radical section 502(a)(1)(B) theory to bar a participant from asserting a section 502(a)(2) claim to recover plan losses. Equally

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> If the trustee fails to purchase specific property which it is his duty to purchase, the beneficiary can charge him with its value at the time of the decree together with the income which would have accrued thereon if he had purchased it.

Rest. 2d Trusts § 211. See also *id.*, cmt c, ill 1.

telling is the fact that respondents did not make this argument before the lower courts and do not advance the argument before this Court.[15]

This case involves an alleged fiduciary breach that resulted in plan losses. Under such circumstances, sections 502(a)(2) and 409 of ERISA expressly render a fiduciary "personally responsible" to restore such plan losses. Such a remedy is not available under section 502(a)(1)(B) of ERISA. In contrast to section 502(a)(2), section 502(a)(1)(B) authorizes relief "under the terms of the plan," *against the plan itself* in situations where the terms of the plan obligate it to pay certain benefits to a participant or beneficiary. For this reason, a section 502(a)(1)(B) claim brought by petitioner in this case (if permitted at all) would have as its object the recovery of monies from a defendant (the DeWolff Plan) *that is not in possession of such funds.*[16] In practical terms, a section 502(a)(1)(B) claim in this case, if permitted to proceed at all, would be seeking a monetary judgment that is either (1) unenforceable or (2) that would be enforced against the beneficial interest of innocent third parties (*i.e.*, the other individual account holders in the DeWolff Plan whose interests in the plan would need to be reduced in order for petitioner to receive a recovery under section 502(a)(1)(B)). As such, it is unsurprising that no court has *ever* endorsed the

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[15] Instead, respondents state in a footnote that "[i]t is conceivable" that petitioner could have pursued his claim under section 502(a)(1)(B) of the statute. Resp. Br. 28 n.16.

[16] This is a central difference between a section 502(a)(1)(B) claim and a section 502(a)(2) claim. The former can be thought of as seeking benefits that were withheld in violation of plan terms; the latter can be thought of as seeking to recover for the plan monies the plan no longer has due to fiduciary breach. This is the latter scenario. As the Fourth Circuit put it: "[Plaintiff] does not challenge a denial of benefits or an action related to a denial of benefits, but rather the *conduct* of [defendants] that he claims has lowered the value of his and the other participants' 401(k) Plan accounts." *Smith v. Sydnor*, 184 F.3d 356, 363 (CA4 1999) (emphasis in original).

radical theory advanced by respondents' *amici*. So it should remain.[17]

II. SECTION 502(A)(3) OF ERISA AUTHORIZES PETITIONER TO SEEK SURCHARGE OF LOSSES CAUSED BY FIDUCIARY BREACH

The Fourth Circuit also erred in holding that the relief sought by petitioner is not available under section 502(a)(3) of ERISA. As explained by petitioner in his opening brief, this Court has held that a plaintiff seeking to bring a claim for equitable relief under section 502(a)(3) must demonstrate that (1) the basis of her claim is equitable and (2) the remedy sought was typically available in pre-merger equity courts under the circumstances at bar. Pet. Br. 30-32. Both conditions are satisfied in this case. Respondents and their *amici* never dispute that the basis of petitioner's claim (*i.e.*, fiduciary breach) is equitable. Instead they assert, with little actual analysis, that the remedy sought by petitioner (*i.e.*, surcharge) is no more than compensatory "legal relief" that was not "typically available" in equity. As explained below, respondents and their *amici* misunderstand the conceptual architecture that this Court has erected to interpret section 502(a)(3) of the statute.

A. Section 502(a)(3) Does Not Bar a Remedy Merely Because It Serves a Compensatory Function

Respondents and their *amici* operate under the assumption that a remedy is necessarily "legal" relief if it serves a compensatory function. Such an assumption ignores this

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[17] Respondents' *amici* claims that if a section 502(a)(2) claim is permitted under the circumstances of this case, every participant in an ERISA-governed plan who wishes to litigate a benefit denial claim will then sue under section 502(a)(2) for fiduciary breach in order to circumvent the administrative exhaustion requirements associated with section 502(a)(1)(B) claims. That danger is vanishingly small for many reasons the most of important of which is this: *few benefit denials actually involve losses to the plan* or otherwise implicate section 502(a)(2).

Court's jurisprudence as well as the historical reality of pre-merger equity practice.

Monetary relief generally serves one of two purposes: restitution or compensation. This Court has rejected the simplistic notion that *all* restitutionary relief is "equitable" and, thus, available under section 502(a)(3). As this Court expressly recognized in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), restitutionary remedies that result in a monetary award can be either legal or equitable, depending on the circumstances in which they are asserted. See *id.* at 212 (explaining that "restitution was available in certain cases at law, and in certain others in equity."). Similarly, this Court has rejected the notion that *all* compensatory relief is "legal" and, thus, unavailable under section 502(a)(3).[18] As this Court expressly recognized in *Sereboff*, *supra*, monetary remedies that perform a compensatory function may be equitable, depending upon the specific circumstances which trigger the remedy. See 126 S. Ct. at 1875 (distinguishing "equitable lien sought as a matter of restitution" with "equitable lien 'by agreement'").[19]

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[18] Such a blithe equivalence is precisely what respondents and their *amici* urge upon this Court. Eschewing any meaningful historical analysis, respondents' argument, in total, is that surcharge bears some similarity to legal damages and is thus unavailable. Respondents' analysis completely ignores this Court's textured standard for determining whether a remedy is equitable and utterly fails to confront the litany of historical and judicial authorities cited by petitioner and his *amici* in support of the claim that surcharge was a typically available equitable remedy. See, *e.g.*, *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869, 1874 (2006) ("To decide whether the restitutionary relief sought by Great-West was equitable or legal, we examined cases and secondary legal materials to determine if the relief would have been equitable '[i]n the days of the divided bench.'").

[19] At the *Sereboff* oral argument, Justice Scalia sharply corrected counsel for assuming that monetary relief must be restitutionary in order to qualify as equitable:

> MR. STRIS: *** A remedy of an equitable lien by assignment, as we explained in our opening brief, is not a restitutionary

As explained in petitioner's opening brief, surcharge is a recognized equitable remedy that would have been available to petitioner in pre-merger equity courts under the factual circumstances of this case. Pet. Br. 32-39; see also Sections II.B and II.C., *infra* (discussing the availability of surcharge in pre-merger courts). That the remedy may serve, *inter alia*, a compensatory function does not disqualify it under section 502(a)(3). See Pet. Br. 39-40. Contrary to the suggestion of respondents and their *amici*, nothing in this Court's 502(a)(3) jurisprudence warrants a contrary conclusion.[20]

B. The Remedy of Surcharge Was Typically Available in Equity

Respondents and their *amici* also dispute that the remedy of surcharge was "typically available in equity." They reach this erroneous conclusion by mistakenly treating the term "typically available" as synonymous with "frequently

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> remedy. No unjust enrichment need be proved. No tracing need be proved. It's purely a contractual remedy.
>
> Now, as a result, courts of equity historically developed this remedy to give priority to one creditor over another if there was a present intent on the part of the promisor to pledge that specific property as security.
>
> JUSTICE SCALIA: But we – but, you know, our opinions haven't said only certain kinds of equitable relief, only restitutionary equitable relief. We've simply said whether equitable relief would normally be available. And now you're – you're trying to rewrite our cases to say that only certain types of equitable relief are -- are available.

Transcript of Oral Argument in *Sereboff v. Mid Atlantic Medical Services, Inc.*, O.T. 2005, No. 05-260, at 9 (Mar. 28, 2006), *available at* <http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-260.pdf>.

[20] To be clear: surcharge often serves a restitutionary function. In fact, every case in which a fiduciary's improper gains are surcharged is an example of restitution. Even the surcharge of a trust loss (without any corresponding gain to the fiduciary) may constitute a request for restitutionary relief.

employed in" or "employed in most" equity cases. This is not how the phrase "typically available" was used by this Court in *Mertens v. Hewitt Assocs.*, 508 U.S. 28 (1993). In *Mertens*, the petitioners and the United States argued that legal damages in breach of trust cases must qualify as equitable relief under section 502(a)(3) because such damages were awarded against trustees in pre-merger equity courts. The Court rejected that argument, explaining that the mere possibility that an equity court could, in some cases, award what was indisputably legal relief, did not transform such a remedy into equitable relief. See Pet. Br. 30. Instead, the relief needed to be "typically available in equity" to qualify under the statute. *Mertens*, 508 U.S. at 256.

Although the *Mertens* Court did not painstakingly define the term "typically available in equity," the doctrinal aim (later expounded upon in *Great-West*, *supra*), was to distinguish (1) legal relief sometimes available in equitable fora—which section 502(a)(3) does not permit—from (2) genuine equitable relief, the latter being those defined remedial mechanisms commonly recognized by pre-merger authorities to be equitable (rather than legal) constructs. See *Great-West*, 534 U.S. at 210 (explaining that the aim of *Mertens* was to exclude from "equitable relief" those "legal remedies that would otherwise be beyond the scope of the equity court's authority."). Surcharge falls within the latter category, being widely recognized as a remedial construct *native* to equity. See Pet. Br. 36-39; see also U.S. Br. 16-19 (collecting and discussing authorities).[21]

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[21] According to this Court, another example of an acknowledged equitable construct is equitable lien by agreement—which, although only employed as a remedial mechanism by pre-merger equity courts in those rare cases in which very specific triggering conditions were present—is nonetheless an equitable construct and thus available under 502(a)(3). *Sereboff*, 126 S. Ct. at 1875-76 (noting that equitable lien by agreement was a "different species of relief" than equitable lien by restitution). Indeed, the *Sereboff* decision shows that the simplistic analysis advanced by respondents and their *amici* is incorrect.

As petitioner noted in his opening brief, the initial Restatement of Trusts, published in 1935, in a section entitled, "*Equitable* Remedies of Beneficiaries," specifically included surcharge, namely: "the beneficiary of a trust can maintain a suit * * * to compel the trustee to redress a breach of trust." Restatement (First) of Trusts §199 (1935) (emphasis added). Legal remedies were set forth in section 198, and that section neither includes surcharge nor is it otherwise applicable to the facts of this case. *Id.* §198; see also Pet. Br. 35-37. Thus, surcharge was not a "legal" remedy occasionally awarded in equity courts; it was fundamentally understood to be a remedial device native to equity.[22] Indeed, surcharge was so clearly recognized as a native and routine equitable construct by pre-merger authorities that, to deny it as being "typically available in equity" because it "feels" compensatory would amount to a *sub rosa* rejection of this Court's holdings in *Mertens*, *Great-West*, and *Sereboff*.

C. This Case Presents a Paradigmatic Example of Circumstances Under Which a Surcharge Remedy Was Available in Pre-Merger Equity Courts

Finally, respondents assert that surcharge is not available in this case by grafting conditions onto the remedy that were never required by pre-merger courts and which run counter to common sense. Resp. Br. 36-37.

Respondents contend that because petitioner has suffered no "out of pocket" loss, the remedy of surcharge is unavailable. Resp. Br. 36 (claiming that "[t]here is scant his-

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[22] According to respondents, petitioner argues that surcharge is equitable merely because it was brought against trustees in equity courts. Resp. Br. 34-35. Petitioner, however, *explained in his opening brief* how the fact that a remedy was brought against trustees in equity courts is not in itself enough to make the remedy equitable. Pet. Br. 30. Respondents thus attribute to petitioner a position that *petitioner* disavowed as overbroad. Surcharge is permissible under section 502(a)(3) because it was universally recognized as a fundamental equitable construct—*not* because it was brought against trustees in pre-merger equitable courts.

torical authority to support the assertion that surcharge was available in a case, like this one, involving no actual out-of-pocket losses by the plaintiff"). This argument is baseless. The remedy of surcharge was commonly employed to charge a breaching fiduciary with losses *incurred by the trust*.[23] Restatement (Second) of Trusts § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with * * * any loss or depreciation *in value of the trust estate* resulting from the breach of trust.") (emphasis added). That a trust beneficiary suffered no "out of pocket" loss is irrelevant; the assets were never in his proverbial pocket. Perhaps by "out of pocket" respondents mean to argue that lost profits suffered from fiduciary breach are not recoverable through surcharge. Such, however, was never the rule. Chargeable to the trustee was "[a]ny profit which would have accrued to the trust estate if there had been no breach of trust." Restatement (First) of Trusts § 205(c); see also *Shepherd v. Mould*s, 4 Hare 503, 504 (1845) (if trustee bound to purchase security by trust terms, beneficiary may charge trustee with "the amount of stock which they might have purchased with the money"); *Pride v. Fooks*, 2 Beav. 430, 432-33 (1840) (trustee chargeable with appreciation that would have arisen if the directed investment had been made). Unsurprisingly, respondents do not cite *any* authority for their contrary assertion.

Respondents also contend that the remedy of surcharge was not available unless a fiduciary engaged in willful mis-

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[23] Several *amici* take issue with the possible use of the surcharge remedy in connection with ERISA plans that are not structured as trusts—such as many welfare plans. Although the Government argues that the remedy of surcharge, based on the contours of its historical use, is properly available in a variety of circumstances, this Court need not reach that question. Petitioner's case presents the paradigmatic situation in which surcharge was historically awarded (*i.e.*, a fiduciary breach has resulted in the decline in value of trust assets and the trust beneficiary is seeking a personal monetary recovery from the fiduciary for such losses). The scope of the surcharge remedy need not be defined by this Court in this case.

conduct. Resp. Br. 36-37. But the availability of a surcharge remedy in pre-merger courts was always available in cases of negligent violation of fiduciary duties. See *Pit v. Cholmondeley,* 28 Eng. Rep. 360 ("[I]f any of the parties can show an omission, for which credit ought to be, that is a surcharge: or if any thing is inserted, that is a wrong charge, he is at liberty to shew it, and that is falsification."); *Brownell v. Brownell,* 29 Eng. Rep. 35 (an account settled ten years before bill was filed, although containing gross errors, could not be opened, but the plaintiff was permitted to surcharge and falsify); see also Restatement (Second) of Trusts § 201, cmt a ("Ordinarily a trustee does not commit a breach of trust if he does not intentionally *or negligently* do what he ought not to do or fail to do what he ought to do.") (emphasis added).[24]

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[24] "'[S]urcharge' * * * is most fittingly defined as '[t]he imposition of personal liability on a fiduciary for willful *or negligent* misconduct in the administration of his fiduciary duties.'" *In re Mailman Steam Carpet Cleaning Corp.* 196 F.3d 1, 7 (CA1 1999) (quoting *Black's Law Dictionary* 1441 (6th ed. 1990) (emphasis added). Indeed, as surcharge was a remedy asserted against fiduciaries, making it available only if willful misconduct were present would run counter to the baseline presumption that fiduciaries owe heightened duties to their beneficiaries. As then-Judge Cardozo famously described it: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon,* 164 N.E. 545, 546 (N.Y. 1929).

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses are attributable to the participant's individual plan account.

2. Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3).

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In the Supreme Court of the United States

No. 06-856

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the scope of two civil enforcement provisions in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* The Secretary of Labor has primary authority for enforcing and administering Title I of ERISA. In response to an invitation from the Court, the United States filed an amicus brief in this case at the petition stage.

STATEMENT

1. Petitioner is a participant in an ERISA-covered Section 401(k) pension plan sponsored by his employer, respondent DeWolff, Boberg & Associates, Inc. (DeWolff). Pet. App. 2a; see 26 U.S.C. 401(k) (2000 & Supp. IV 2004). DeWolff administers the plan and is thus an ERISA fiduciary. Pet. App. 2a; 29 U.S.C. 1002(21)(A)(iii). The plan is a "defined contribution" or "individual account plan." That type of plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such partic-

ipant's account." 29 U.S.C. 1002(34). Although each participant has an individual account, all of the assets are held in trust by plan trustees, who retain title to and authority over the assets. 29 U.S.C. 1103(a); Rev. Rul. 89-52, 1989-1 C.B. 110.

Under the plan, participants may choose among several investment options and direct DeWolff, as plan administrator, to invest the amounts allocated to their accounts in specified percentages among those options. Pet. App. 2a. Petitioner claimed that DeWolff breached its fiduciary duties by failing to follow petitioner's directions, causing a loss of approximately $150,000 to his "interest in the plan." *Id.* at 2a-3a. Petitioner sought to have the plan reimbursed for that loss, as "appropriate 'make whole' or other equitable relief pursuant to [ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3)]." Br. in Opp. App. 4a; *id.* at 50a. Section 502(a)(3) authorizes a plan participant and others to sue for, among other things, "appropriate equitable relief * * * to redress" "any act or practice which violates" ERISA. 29 U.S.C. 1132(a)(3). The district court entered judgment on the pleadings for respondents, concluding that the monetary remedy sought by petitioner is unavailable under ERISA. Pet. App. 15a-21a.

2. The court of appeals affirmed. Pet. App. 1a-14a. The court first rejected petitioner's argument that respondents are liable for the $150,000 loss to the plan under ERISA Sections 502(a)(2) and 409(a), 29 U.S.C. 1109(a), 1132(a)(2). Those provisions authorize a participant, beneficiary, fiduciary, or the Secretary of Labor to sue a fiduciary to recover "losses to the plan" resulting from a breach of fiduciary duty. 29 U.S.C. 1109(a); see 29 U.S.C. 1132(a)(2). The court held that, "[e]ven if the [Section 502(a)(2)] argument were not * * * waived," petitioner could not state a claim under that provision because "[r]ecovery under [Section 502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*,' not to particular persons with rights under the plan." Pet. App. 5a (quoting *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985)). The court concluded that petitioner's suit would not benefit the plan as a whole for three rea-

sons: (1) he sought "recovery to be paid into his plan account, an instrument that exists specifically for his benefit;" (2) "[t]he measure of that recovery is a loss suffered by him alone;" and (3) "that loss itself allegedly arose as the result of [respondent's] failure to follow [petitioner's] own particular instructions, thereby breaching a duty owed solely to him." *Id.* at 6a.

The court of appeals also held that petitioner could not state a claim under Section 502(a)(3). Pet. App. 7a-13a. In the court's view, petitioner sought monetary relief indistinguishable from compensatory damages, which are not available under Section 502(a)(3). *Id.* at 9a-10a. The court rejected petitioner's argument that he was seeking equitable relief because he was suing a fiduciary to recover losses caused by a fiduciary breach—relief that was historically available only in equity. *Id.* at 10a-13a. The court concluded that petitioner's argument was foreclosed by *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), because the relief he sought was available in equity only against a trustee and not "as a general rule." Pet. 12a (citation omitted); see *id.* at 9a-13a.

3. Petitioner sought panel and en banc rehearing on the Section 502(a)(2) issue, and the Secretary of Labor filed an amicus brief in support of his petition. The court of appeals denied the petition. Pet. App. 22a-29a.

SUMMARY OF ARGUMENT

ERISA does not leave a participant in petitioner's position without an effective remedy. To the contrary, a participant in a defined contribution plan may sue to recover losses to the plan, including losses attributable to his own account, under Section 502(a)(2), 29 U.S.C. 1132(a)(2), and may also recover for breach of fiduciary duty under Section 503(a)(3), 29 U.S.C. 1132(a)(3).

I. A. Section 502(a)(2), together with ERISA Section 409(a), authorizes a plan "participant" to sue to recover "*any* losses to the plan" resulting from each breach of "*any* of the responsibili-

ties, obligations, or duties imposed upon fiduciaries" by ERISA. 29 U.S.C. 1109(a), 1132(a)(2) (emphases added). Whenever a defined contribution plan suffers losses, they will be attributable to the individual accounts of plan participants. But that does not alter their character as "losses to the plan." Although the assets of a defined contribution plan are allocated, as a bookkeeping matter, to individual accounts for the beneficial interest of the participants, the assets are held in trust and legally owned by the plan trustees. Thus, losses attributable to a participant's individual plan account are "losses to the plan" recoverable under Section 502(a)(2). That conclusion is reinforced by 29 U.S.C. 1104(c) (2000 & Supp. IV 2004), which, in certain circumstances, exempts fiduciaries from liability for losses caused by a participant's exercise of control over assets in his plan account. That provision would be superfluous if fiduciaries never had liability for losses attributable to an individual plan account.

B. Allowing suits to recover plan losses attributable to a participant's account furthers ERISA's purpose of protecting participants by "providing * * * appropriate remedies * * * and ready access to the Federal courts" to enforce ERISA's fiduciary duties. 29 U.S.C. 1001(b). That purpose would be undermined if Section 502(a)(2) did not authorize such suits. At a minimum, fiduciaries of defined contribution plans would be immunized from liability for breaches of duty, no matter how egregious, if they primarily affected the plan account of only a single participant. Moreover, there is no statutory or logical basis to limit a holding that Section 502(a)(2) does not provide relief to suits affecting only a single participant's account. Thus, a holding that petitioner is not entitled to sue here would seriously undermine the protection ERISA provides for the retirement savings of millions of Americans.

C. A holding that Section 502(a)(2) authorizes petitioner's suit is fully consistent with *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). Unlike petitioner, the plaintiff in *Russell* did not seek to recover for the plan losses to

the plan. Instead, she sought to recover for herself compensatory and punitive damages that she suffered personally because of a delay in receiving her benefits.

II. A. ERISA Section 502(a)(3), which provides for "appropriate equitable relief" to redress violations of ERISA, 29 U.S.C. 1132(a)(3), also authorizes suits against fiduciaries to recover losses from fiduciary breaches.

The "equitable relief" authorized by Section 502(a)(3) is relief that was "typically available in equity" rather than at law. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis omitted). Relief is equitable if both the claim and the remedy sought would have been considered equitable in the days of the divided bench. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002); *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1873-1877 (2006). Historically, equity courts exercised virtually exclusive jurisdiction over claims by a beneficiary against a trustee for breach of trust. In those actions, equity provided a variety of remedies, one of which was to compel the trustee to redress the breach through the payment of money. That remedy, which was sometimes referred to as "surcharge," allowed the beneficiary to charge the trustee either for any profits made as a result of the breach or for the amount necessary to restore losses that would not have been suffered if the trust had been properly administered. Although surcharge was a form of monetary redress, it was distinct from legal damages and was available only in equity for a claim over which equity had exclusive jurisdiction. A suit against an ERISA fiduciary to recover losses caused by a breach of duty is therefore "equitable relief" under Section 502(a)(3).

B. Construing Section 502(a)(3) to authorize suits to redress fiduciary breaches also accords with the central role of fiduciaries and fiduciary duties under ERISA. Given that central role, it is hard to imagine that Congress would have left participants who have been injured by fiduciary breaches without any effec-

tive federal remedy. But that it is precisely the result that respondents seek.

C. Indeed, a holding that Section 502(a)(3) does not authorize monetary redress for fiduciary breaches would do more than deprive a large number of injured participants of an effective *federal* remedy. It would leave them without *any* meaningful remedy because virtually all state-law remedies for breach of fiduciary duty would be preempted by ERISA.

D. Suits under Section 502(a)(3) against fiduciaries for monetary redress of fiduciary breaches are consistent with both *Mertens* and *Great-West*. *Mertens* was a suit not against a fiduciary, but against a third party who provided services to the plan. Third-party service providers have no real power to control plan actions. This Court therefore concluded in *Mertens* that Congress reasonably decided not to provide damages actions against them. And there is little need for such an ERISA remedy because state-law remedies will generally be available. Fiduciaries, in contrast, are central to the ERISA regime, and state-law remedies against them are generally preempted. Moreover, unlike petitioner, who seeks the equitable remedy of surcharge, the plaintiffs in *Mertens* sought compensatory and punitive damages, relief that was typically available from courts of law. Likewise, *Great-West* was not a suit against a fiduciary seeking the equitable remedy of surcharge, but a suit by a plan against beneficiaries seeking money damages for breach of contract. That dispute did not implicate the concern to protect the interests of plan participants that motivated Congress to enact ERISA.

ARGUMENT

ERISA is a complicated statute. But it is neither so complicated nor so counterintuitive that it leaves someone in petitioner's position without a remedy. Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those]

plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). To that end, ERISA imposes stringent duties on plan fiduciaries, 29 U.S.C. 1104 (2000 & Supp. IV 2004), and includes several "carefully integrated" provisions authorizing participants and other interested parties to sue to enforce those duties, as well as other ERISA requirements. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Despite the evident congressional intent to provide appropriate remedies and ready access to federal court, the court of appeals adopted a construction of Sections 502(a)(2) and 502(a)(3), 29 U.S.C. 1132(a)(2) and (3), that leaves participants in the most common form of pension plan who have been injured by a breach of fiduciary duty without a meaningful remedy from any court, state or federal. Under a correct reading of Sections 502(a)(2) and 502(a)(3), a participant whose account in a defined contribution plan suffers losses as the result of a fiduciary breach has a remedy under both those provisions.

I. SECTION 502(a)(2) AUTHORIZES A PARTICIPANT IN A DEFINED CONTRIBUTION PLAN TO SUE TO RECOVER LOSSES TO THE PLAN THAT ARE ATTRIBUTABLE TO HIS INDIVIDUAL PLAN ACCOUNT

A. ERISA's Text Establishes That A Participant May Seek Relief For Any Losses To The Plan, Including Losses Attributable To His Individual Plan Account

Section 502(a)(2) provides that "[a] civil action may be brought" by a plan "participant," beneficiary, or fiduciary, or by the Secretary of Labor, to obtain "appropriate relief" under Section 409 of ERISA. 29 U.S.C. 1132(a)(2). Section 409(a), in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits

* * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a). Those provisions authorize a participant in a defined contribution plan to sue to recover losses to the plan that are attributable to his individual account.

Petitioner claims that DeWolff violated its fiduciary duties by failing to invest assets in his plan account in accordance with his directions and that, as a result, the plan and his account held approximately $150,000 less than they would otherwise have held. Pet. App. 2a-3a; Br. in Opp. App. 3a-4a. Petitioner seeks an order requiring DeWolff "to reimburse to the plan amounts necessary so that [his] interest in the plan is what it should have been, but for the breach of fiduciary duty." *Id.* at 50a.

Petitioner's suit falls squarely within the text of Sections 502(a)(2) and 409(a). Those provisions authorize a "participant" to sue "*[a]ny*" fiduciary to recover [redacted] losses to the plan" resulting from "each * * * breach" of *any* of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA. 29 U.S.C. 1109(a), 1132(a)(2) (emphases added). As this Court has observed, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *HUD* v. *Rucker*, 535 U.S. 125, 131 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Sections 502(a)(2) and 409(a) thus allow recovery of *all* plan losses caused by a breach of ERISA's fiduciary duties—including losses that are in turn visited upon the account of a particular participant.

Whenever a defined contribution plan suffers losses, those losses necessarily will affect the balances in the plan accounts of one or more participants. Likewise, a recovery of those losses will always be allocated to one or more individual plan accounts. But that does not alter their character as "losses to the plan." It simply reflects the nature of a defined contribution plan. By statutory design, the assets of a defined contribution plan (including "gains and losses" and legal recoveries) are allocated, as a bookkeeping matter, to individual accounts within the plan for

the beneficial interest of the participants, whose benefits are dependent on the amounts so allocated. 29 U.S.C. 1002(34); Employee Benefits Sec. Admin. (EBSA), DOL, *Field Assistance Bulletin 2006-1*, at 8 (Apr. 2006) <http://www.dol.gov/ebsa/pdf/fab2006-1.pdf>. At the same time, ERISA requires the assets to be held in a trust and legally owned by the plan trustees. See 29 U.S.C. 1103(a); 26 U.S.C. 401(a) (2000 & Supp. IV 2004); Rev. Rul. 89-52, 1989-1 C.B. 110. Accordingly, losses attributable to the plan account of an individual participant are "losses to the plan," and they may be recovered in a suit under Section 502(a)(2).

That conclusion is reinforced by Section 404(c) of ERISA, 29 U.S.C. 1104(c) (2000 & Supp. IV 2004). Section 404(c) provides that, if a defined contribution plan "permits a participant * * * to exercise control over the assets in his [plan] account," and the participant exercises that control as defined in the Secretary's regulations, "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's * * * exercise of control." 29 U.S.C. 1104(c)(1). That provision would serve no purpose if fiduciaries had no liability in the first place for losses that are attributable to an individual participant's plan account. Congress's decision to include Section 404(c)—a limitation on liability in the context of individual plan accounts—thus confirms that fiduciaries are generally liable for losses attributable to individual plan accounts. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 258 (1993) (refusing to read ERISA in manner that would "render" a provision "superfluous").[1]

B. Allowing Suits To Recover Plan Losses Attributable To Individual Plan Accounts Furthers ERISA's Purposes

One of ERISA's express purposes is "to protect * * * participants * * * and their beneficiaries" by establishing stan-

[1] Respondents have not contended that they are exempt from liability under Section 404(c).

dards of conduct for fiduciaries and "providing * * * appropriate remedies * * * and ready access to the Federal courts" to enforce those standards. 29 U.S.C. 1001(b). "[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Russell*, 473 U.S. at 141 n.8. Sections 502(a)(2) and 409(a) "reflect[] [that] special congressional concern about plan asset management" by providing participants and others with a remedy for the breach of "fiduciary obligations related to the plan's financial integrity." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511-512 (1996). ERISA's goals are thus well served by construing Section 502(a)(2) to authorize a participant to sue to recover losses attributable to his individual plan account that have resulted from fiduciary mismanagement of plan assets.

In contrast, ERISA's purposes would be undermined if this Court affirmed the court of appeals' holding that Section 502(a)(2) does not authorize such suits. At a minimum, fiduciaries would be immunized from liability for breaches of duty, no matter how egregious, if the breaches primarily affected the account of a single participant in a defined contribution plan. Plan fiduciaries, participants, and even the Secretary of Labor would be unable to recover losses caused by those breaches. Currently, the Secretary brings many cases each year against fiduciaries who fail to forward employee contributions to their plans. See EBSA, DOL, *Fact Sheet: Retirement Security Initiatives* (Apr. 2007) <http://www.dol.gov/ebsa/newsroom/fsecp.html>. Under the court of appeals' approach, the Secretary would likely be unable to recover losses caused by the diversion of contributions from a single participant's account, even though the plan clearly received fewer assets than it should have. Those limitations on redress for fiduciary breaches would have a substantial impact on the retirement savings of American workers. Defined contribution plans are the predominant type of pension plan in the United States and hold approximately $3.3 trillion in assets. See Board of Governors of the Fed. Reserve Sys., *Flow of Funds Accounts of the United States: Flows and Outstand-*

ings, First Quarter 2007, Statistical Release Z.1, at 113 (June 7, 2007)<http://www.federalreserve.gov/releases/Z1/current/Z1.pdf>.

It is difficult, moreover, to envision how a holding that Section 502(a)(2) does not allow relief could be limited to suits that involve losses to a single participant's account. As discussed above, any losses suffered by a defined contribution plan are always attributable to individual accounts, because ERISA requires the allocation of all of the plan's assets among those accounts. Thus, regardless of the number of participants affected, the nature of the loss remains the same. It is no more a "loss to the plan" when it affects a large number or percentage of participants than when it affects only one. There is therefore no statutory or logical basis on which to draw a line between cases involving losses to a single plan account and cases involving losses to the accounts of many or most participants.

There is also no basis on which to limit a ruling that Section 502(a)(2) does not allow relief to situations where the breach is "individual in nature," Br. in Opp. 6, or the breached duty is "owed solely" to a single participant, Pet. App. 6a. ERISA's fiduciary duties apply to *all* of the assets of a plan and protect *all* plan participants. See 29 U.S.C. 1104(a). And Sections 502(a)(2) and 409(a) provide a remedy for the breach of "*any* of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA, regardless of whether the breach affects one participant or all of them. 29 U.S.C. 1109(a) (emphasis added).

Thus, if this Court affirmed the court of appeals' Section 502(a)(2) holding, the Court would, at the very least, create substantial uncertainty about when participants in defined contribution plans may sue to recover plan losses caused by fiduciary breaches. The lower federal courts would likely become mired in litigation as they sought to decide what number or percentage of participants was sufficient to "serve as a legitimate proxy for the plan in its entirety" or when a plan's loss resulted from the breach of "a duty owed solely to" an individual participant. Pet.

App. 6a. Indeed, because there is no coherent way to distinguish this case from cases involving losses affecting many or most plan participants, affirmance of the decision below could lead to a rule that Section 502(a)(2) suits are permissible for a defined contribution plan only when all or virtually all participants have been affected by the breach. That will seldom be the case for Section 401(k) plans, because they usually offer an array of investment options, and different participants elect different options. See EBSA, DOL, *Private Pension Plan Bulletin: Abstract of 2004 Form 5500 Annual Reports* 44 (Mar. 2007) <http://www.dol.gov/ebsa/PDF/2004pensionplanbulletin. pdf>. Because Section 401(k) plans comprise the majority of ERISA-covered pension plans, *id.* at 2, 44, adopting the court of appeals' approach could significantly reduce the protection that ERISA provides for the retirement assets of millions of Americans.

C. Construing Section 502(a)(2) To Authorize Relief In This Case Is Consistent With This Court's Decision In *Russell*

The court of appeals mistakenly concluded that Section 502(a)(2) does not authorize relief in this case primarily because it misinterpreted this Court's decision in *Russell*. See Pet. App. 5a-6a. Contrary to the court of appeals' belief, *Russell* poses no barrier to a suit like petitioner's, in which a participant in a defined contribution plan seeks to recover for the plan losses caused by a fiduciary breach and manifested in the participant's plan account. The plaintiff in *Russell* did not seek a recovery for the plan of losses to the plan . Instead, she sought a recovery for herself of compensatory and punitive damages that she had suffered personally because of a delay in her receipt of disability benefit payments. 473 U.S. at 137-138. *Russell*'s holding that Section 502(a)(2) does not authorize damages payable directly to a participant does not affect the availability of relief payable to a plan, even if the participant who initiates the suit knows that the plan will allocate the award to the participant's plan account.

Indeed, *Russell*'s reasoning supports the availability of relief here. The Court distinguished the relief sought in *Russell*—damages payable directly to a participant for pain and suffering—from relief payable to the plan to recoup "losses to the plan" arising from mismanagement of plan assets, which the Court understood to be available under Section 502(a)(2). See 473 U.S. at 140-141 & n.8, 142, 144. That is precisely what petitioner seeks here—a payment to the plan equal to the losses to the plan that resulted from respondent's mismanagement of plan assets. The fact that the losses and recovery are both attributable to petitioner's plan account does not change the result. Indeed, Congress, in specifically empowering a participant to sue to recover for the plan, presumably anticipated that a participant would have an incentive to sue precisely because relief for the plan would also inure to the participant's benefit.

The court of appeals mistakenly concluded that *Russell* precludes relief because it gave an overly literal reading to this Court's statement in *Russell* that a recovery under Section 502(a)(2) "must 'inure[] to the benefit of the plan *as a whole*.'" Pet. App. 5a (quoting 473 U.S. at 140). As this Court has admonished, it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515 (1993). The statement in *Russell* sought to distinguish between a recovery for the plan of losses to the plan (which is permitted by Section 502(a)(2)) and a recovery for an individual participant in his personal capacity of compensatory or punitive damages suffered by that participant alone (which is not). In emphasizing that distinction, the court may have had in mind a situation where the recovery would benefit all participants equally, but the Court did not hold that Section 502(a)(2) is limited to that situation. *Russell* did not present that issue. Nor does anything in the text of Sections 502(a)(2) or 409(a) suggest that relief is barred simply because it also benefits plan participants. And imposing such an extratex-

tual limitation on the otherwise broad statutory language would be inconsistent with the Court's "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." 473 U.S. at 147. It would also be inconsistent with the fundamental purpose of ERISA (including its remedial provisions), which is to protect plan participants and their beneficiaries, not simply the plan itself for its own sake.

Moreover, a recovery for the plan of losses attributable to a participant's individual account actually benefits "the plan as whole," even if most of the benefit inures to the individual account holder. A payment to the plan to restore losses to an individual account increases the total assets held by the plan as a whole, and a portion of the recovered assets, like any assets of the plan, generally are available to defray the operating expenses of the entire plan. See EBSA, DOL, *Field Assistance Bulletin 2003-3* (May 19, 2003) <http://www.dol.gov/ebsa/regs/fab_2003-3.html>. The court of appeals therefore erred in concluding that Section 502(a)(2) does not authorize petitioner's suit.

II. SECTION 502(a)(3) AUTHORIZES AN ACTION AGAINST A PLAN FIDUCIARY TO RECOVER LOSSES CAUSED BY A FIDUCIARY BREACH

The court of appeals also erred in holding that Section 502(a)(3) does not permit a suit against a fiduciary to recover losses resulting from a breach of fiduciary duty. Section 502(a)(3) authorizes a plan participant, beneficiary, or fiduciary to bring a civil suit "to enjoin any act or practice which violates" ERISA, including its fiduciary duties, or "to obtain other appropriate equitable relief * * * to redress such violations." 29 U.S.C. 1132(a)(3). A suit to compel a fiduciary to provide monetary redress for a breach of fiduciary duty seeks "equitable relief," and it is therefore authorized under Section 502(a)(3).[2]

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[2] A plan participant, such as petitioner, may seek relief for a fiduciary breach under both Sections 502(a)(2) and 502(a)(3) under ordinary principles of civil procedure, which permit the joinder of alternative claims in a single

A. A Suit Against A Fiduciary To Obtain Monetary Redress For A Breach Of Fiduciary Duty Seeks "Equitable Relief," Because Both The Claim And The Remedy Were Typically Available In Equity In The Days Of The Divided Bench

1. In *Mertens*, this Court concluded that the "equitable relief" authorized by Section 502(a)(3) is relief that was "typically available in equity." 508 U.S. at 256 (emphasis omitted). Applying that standard, the Court held that Section 502(a)(3) did not permit a suit to recover money damages from a non-fiduciary third party who provided services to a plan. See *id.* at 256-263. The Court explained that "[m]oney damages are * * * the classic form of *legal* relief," and Congress could reasonably have decided not to provide that relief against non-fiduciaries because, unlike fiduciaries, they have "no real power to control what the plan d[oes]." *Id.* at 255, 262.

The Court revisited the scope of Section 502(a)(3) in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). In *Great-West*, the Court held that Section 502(a)(3) did not authorize an ERISA plan to sue to enforce a plan provision requiring beneficiaries to reimburse the plan for medical benefits for which they received a recovery from third parties. See *id.* at 206, 221. The Court concluded that the plan was not seeking "equitable relief" because, in essence, the plan sought compensatory damages from the beneficiaries "for a *contractual* obligation to pay money—relief that was not typically available in equity," *id.* at 210 (emphasis added); accord *id.* at 211-213. The Court rejected the plan's effort to characterize that relief as equitable

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action. Fed. R. Civ. P. 8(a), 8(e)(2); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1257, 1282, 1283 (3d ed. 2004). If this Court rejects the argument that Section 502(a)(2) provides a remedy here, or if relief for the breach otherwise proves unavailable under Section 502(a)(2), then the participant could recover under Section 502(a)(3). If, however, adequate relief is available under Section 502(a)(2), then the participant would generally not be entitled to relief under Section 502(a)(3), because additional relief would not be "appropriate," 29 U.S.C. 1132(a)(3). See *Varity*, 516 U.S. at 515.

restitution because the plan sought a recovery from the general assets of the beneficiaries rather than from specific funds to which the plan claimed a right. See *id.* at 212-218. The Court explained that, in the days of the divided bench, restitution was available at both law and equity, and, therefore, "whether it is legal or equitable" under Section 502(a)(3) "depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 213 (citation omitted).

The Court most recently addressed the meaning of "equitable relief" in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006). There, the Court concluded that a plan could enforce a reimbursement provision under Section 502(a)(3) because the beneficiary had preserved the disputed funds pending resolution of the claim, and the plan sought to enforce "an equitable lien established by agreement" against those funds. *Id.* at 1873-1877. The Court held that the plan sought "equitable relief" under Section 502(a)(3) because both the basis for the plan's claim and the relief sought would have been considered equitable in the days of the divided bench. *Ibid.*

2. Under the analysis in those cases, a suit against a plan fiduciary to recover losses caused by a breach of fiduciary duty seeks "equitable relief." Both the claim and the relief were typically—indeed, exclusively— available in equity in the days of the divided bench.

a. A suit against an ERISA fiduciary to recover losses caused by the fiduciary's breach is precisely analogous to a traditional action by the beneficiary of a trust to compel the trustee to redress a breach of trust. Those claims have always been at the heart of equitable jurisdiction. The courts of equity first recognized the trust as an institution and fostered and developed it. George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 870, at 123 (rev. 2d ed. 1995) (Bogert). In a trust, the legal title to property is held by the trustee for the benefit of the beneficiary. Because the beneficiary has only an equitable rather than a legal interest in the trust property, and the trustee's duty

to the beneficiary is also equitable, the beneficiary generally could not enforce that duty in a court of law. See 1 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 2.6-2.7, at 48-49 (4th ed. 1987) (Scott); James P. Holcombe, *An Introduction to Equity Jurisprudence on the Basis of Story's Commentaries* 10 (1846) (Holcombe). Equity therefore exercised exclusive jurisdiction over claims by a beneficiary against a trustee for breach of trust, subject to limited exceptions not relevant here. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); *id.* § 198, at 434; see *Duvall* v. *Craig*, 15 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, only suable in equity."); *Manhattan Bank* v. *Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for breach of trust.").

b. In an action for breach of trust, equity provided a variety of remedies. See Second Restatement § 199, at 437. One of those remedies was "to compel the trustee to redress [the] breach," including by "the payment of money." *Ibid.*; 3 Scott § 199.3, at 206; see 4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 (5th ed. 1941) (Pomeroy) ; John Adams, Jun., *The Doctrine of Equity; Being a Commentary on the Law as Administered by the Court of Chancery* 93 (1850) (Adams); 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 1266-1278, at 519-534 (12th ed. 1877) (Story). Depending on the circumstances, the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit that would have accrued if there had been no breach of trust." 3 Scott § 205, at 237; see Restatement (Third) of Trusts–Prudent Investor Rule § 205, at 222-223 (1992) (Third Restatement).

This monetary recovery for breach of trust was sometimes referred to as "surcharge," because the trustee was "chargeable" for the recovery on top of the trust balance reflected in his accounting. Third Restatement § 205 & cmt. a at 223 (noting that

"the beneficiaries may surcharge the trustee" if a fiduciary breach causes a loss); see Bogert § 862, at 36 (explaining that liability for breach of trust may be imposed "either in a suit brought for that purpose or on an accounting where the trustee is surcharged beyond the amount of his admitted liability"); 3 Scott § 205, at 238-239 (describing the defalcations for which "the trustee is subject to a surcharge"); *Black's Law Dictionary* 1482 (8th ed. 2004) (defining "surcharge" as "[t]he amount that a court may charge a fiduciary that has breached its duty"); *e.g.*, *United States* v. *Mason*, 412 U.S. 391, 398 (1973) (holding that United States was not subject to "surcharge" for paying state tax on property held in trust for Indians because it acted with requisite care (quoting 2 Scott § 176, at 1419 (3d ed. 1967))); *Mosser* v. *Darrow*, 341 U.S. 267, 270-273 (1951) (holding that district court properly imposed "surcharge" on bankruptcy trustee); *Princess Lida of Thurns & Taxis* v. *Thompson*, 305 U.S. 456, 458, 464 (1939) (describing authority of Pennsylvania state court, in "suit in equity," "to surcharge [trustee] with losses incurred").[3]

Courts and treatise writers also used a variety of other terms to refer to surcharge, including "personal liability," "compensation," "indemnification," and "the payment of money." See 4 Pomeroy § 1080, at 229; 3 Scott § 199.3, at 206. They even sometimes called surcharge "damages," particularly after the merger of law and equity. See, *e.g.*, Bogert § 862, at 34; *United States* v. *Mitchell*, 463 U.S. 206, 226 (1983). Despite the varying labels attached to it, surcharge has a long history as a distinct remedy available exclusively in equity. That remedy also differed from the legal remedy of damages in significant ways: First, surcharge was sometimes measured by the trustee's improper gains,

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[3] The term "surcharge" was also used to refer to the situation, on an equitable bill for account, in which an equity court would permit a stated account to be reopened and adjusted to add a credit that had been improperly omitted. See 1 Story § 525, at 520; *Black's Law Dictionary* 1482. In this brief, we use the term not in that sense but to refer to the monetary redress that equity courts provided for breach of fiduciary duty.

rather than the beneficiary's loss. See 3 Scott § 205, at 237 (trustee may be charged "with any profit made through the breach of trust"). Second, even when measured by the beneficiary's loss, surcharge provided compensation only for economic injury, not non-pecuniary harm. See *id.* at 237-250 (describing extent of trustee's liability and making no mention of liability for non-economic injury); Third Restatement § 205, at 223 (same). Third, at least in the days of the divided bench, surcharge was limited to make-whole relief, and neither nominal nor exemplary damages were available. See 2 Story § 1278, at 534 (purpose of remedy is "to compensate the *cestui que trust*"); 3 Scott § 205, at 239 (trustee "is not subject to a surcharge for a breach of trust that results in no loss"); Dan B. Dobbs, *Law of Remedies* § 3.11(1), at 315 (1993) (punitive damages were traditionally not available in equitable actions, although courts have begun to award them since the merger of law and equity); accord *Tull* v. *United States*, 481 U.S. 412, 422 (1987). Thus, although surcharge was a form of monetary redress, it was an equitable remedy distinct from legal damages that was available only in equity for a claim over which equity had exclusive jurisdiction.

Moreover, surcharge was available for the precise breach of duty that petitioner has alleged here—a fiduciary's purchase of improper investments. See Third Restatement § 205 cmt. a, at 233; Adams 94; 2 Story §§ 1273-1274, at 526-529; *Gates* v. *Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam). Thus, a suit against a fiduciary to recover investment losses caused by a breach of fiduciary duty seeks "equitable relief" and is authorized by Section 502(a)(3).[4]

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[4] That conclusion is supported by the case law on the right to jury trial in breach-of-trust cases. Until this Court's decision in *Great-West*, all the courts of appeals that had considered an action for monetary relief against a breaching fiduciary under either Section 502(a)(2) or Section 502(a)(3) of ERISA had concluded that there was no right to a jury trial because the claims were equitable. See, *e.g.*, *Phelps* v. *C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323-1324 (5th Cir. 1994), cert.

B. Suits Under Section 502(a)(3) To Redress Fiduciary Breaches Accord With The Central Role Of Fiduciaries And Fiduciary Duties Under ERISA

Fiduciaries and fiduciary duties have a central role in the ERISA regime. Fiduciaries have primary responsibility for administration and control of ERISA-covered plans. See *Mertens*, 508 U.S. at 262; 29 U.S.C. 1002(21)(A). Congress therefore viewed the fiduciary duties imposed by ERISA as affording critical protection for plan participants and beneficiaries. 29 U.S.C. 1001(b). And Congress intended ERISA to provide "appropriate remedies" and "ready access to the Federal courts" to prevent and to redress violations of those fiduciary duties. *Ibid.*

It is thus "hard to imagine" that Congress would have left participants and beneficiaries who have been injured by a breach of ERISA's fiduciary duties without any effective federal remedy. *Varity*, 516 U.S. at 513. But that is what would occur in many situations if this Court held that Section 502(a)(3) does not authorize suits against fiduciaries to recover losses for fiduciary breaches. As discussed above, relief under Section 502(a)(2) is available for breaches of fiduciary duty that result in "losses to the plan." 29 U.S.C. 1109(a). But many breaches, particularly in the context of welfare plans, cause losses only to individual participants and beneficiaries and not to the plan. For example, a fiduciary's negligence in submitting health insurance premiums may leave a plan participant without coverage during a costly illness. *E.g.*, *McFadden* v. *R&R Engine & Mach. Co.*, 102 F. Supp. 2d 458 (N.D. Ohio 2000). Similarly, a fiduciary's negligent

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denied, 514 U.S. 1066 (1995). Likewise, courts generally held that there was no right to a jury trial in non-ERISA fiduciary-breach cases. See, *e.g.*, *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985); *Uselman* v. *Uselman*, 464 N.W.2d 130, 137 (Minn. 1990); *First Ala. Bank, N.A.* v. *Spragins*, 475 So. 2d 512, 513 (Ala. 1987) (per curiam); but see *Pereira* v. *Farace*, 413 F.3d 330, 339-341 (2d Cir. 2005) (reading *Great-West* to require a jury trial in a non-ERISA breach-of-fiduciary-duty case), cert. denied, 126 S. Ct. 2286 (2006).

processing of a life insurance application or premiums may leave a participant's beneficiaries without the insurance proceeds that they expected. *E.g.*, *Strom* v. *Goldman Sachs & Co.*, 202 F.3d 138, 140-141 (2d Cir. 1999). And a fiduciary's provision of inaccurate information about the tax consequences of distribution options may cause a participant to suffer a substantial tax liability that should have been avoided. *E.g.*, *Griggs* v. *E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 373-374 (4th Cir. 2001). Thus, if Section 502(a)(3) did not permit traditional suits in equity for monetary redress of fiduciary breaches that caused participants or beneficiaries to lose payments or distributions from the plan (see Third Restatement § 205(b) at 233), ERISA would provide no meaningful relief for a large class of participants and beneficiaries who have been seriously injured by those breaches. The adverse consequences would even more severe if this Court held, contrary to our submission in Part I, that Section 502(a)(2) is not available in a case like this one even though a recovery would be paid into the plan.

The court of appeals suggested that, even if monetary relief were precluded under Section 502(a)(3), participants and beneficiaries would not lack an ERISA remedy, because they could seek an injunction compelling the fiduciary to fulfill its duties or, in some circumstances, bring suit on the plan's behalf to remove the fiduciary. Pet. App. 13a. But those remedies, even in the limited circumstances in which they are available, are hollow ones for individuals who have already suffered devastating financial losses as a result of fiduciary misdeeds. Leaving those participants and beneficiaries without a meaningful federal remedy cannot be squared with ERISA's purpose of providing them with "ready access to the Federal courts" to redress violations of ERISA's fiduciary duties. 29 U.S.C. 1001(b). It is particularly appropriate to interpret Section 502(a)(3) as providing the necessary remedy. As this Court has noted, Congress intended Section 502(a)(3) to be a "'catchall' provision[]" that would "act as a safety net, offering appropriate equitable relief for injuries

caused by violations that § 502 does not elsewhere adequately remedy." *Varity*, 516 U.S. at 512.

C. Suits Under Section 502(a)(3) To Redress Fiduciary Breaches Are Necessary To Achieve ERISA's Goal Of Protecting Plan Participants And Beneficiaries

A holding that Section 502(a)(3) does not authorize monetary redress for fiduciary breaches would do more than deprive a large number of injured participants and beneficiaries of an effective *federal* remedy. It would leave them without *any* meaningful remedy. Congress could not have intended that result.

ERISA contains an expansive preemption provision, which generally displaces all state laws that "relate to any [ERISA-covered] plan." 29 U.S.C. 1144(a). That preemption provision overrides state-law remedies against plan fiduciaries arising from a breach of an ERISA fiduciary duty. See, *e.g.*, *Peralta* v. *Hispanic Bus., Inc.*, 419 F. 3d 1064, 1069 (9th Cir. 2005); *Eckelkamp* v. *Beste*, 315 F.3d 863, 870 (8th Cir. 2002); *Dudley Supermkt., Inc.* v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 4 (1st Cir. 2002); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1083 (5th Cir. 1996); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208-209 (2004). Consequently, if a participant or beneficiary who has been injured by a fiduciary breach has no effective remedy under ERISA, he has no effective remedy at all. Congress could not have intended to replace otherwise available state-law remedies with nothing. Leaving participants and beneficiaries without any meaningful remedy would severely undermine ERISA's goal of "protect[ing] * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b).

For that reason, the narrow reading of Section 502(a)(3) mistakenly adopted by the court of appeals, and by several other courts since *Mertens* and *Great-West*, has led to a "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA regime." *Davila*, 542 U.S. at 222 (Ginsburg, J.,

joined by Breyer, J., concurring) (citation omitted). See, *e.g.*, *Eichorn* v. *AT&T Corp.*, No. 05-5461, 2007 WL 1574869, at *1-*2 (3d Cir. May 31, 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); *Lind* v. *Aetna Health Inc.*, 466 F.3d 1195, 1200 (10th Cir. 2006); *Pereira* v. *Farace*, 413 F.3d 330, 345-346 (2d Cir. 2005) (Newman, J., concurring), cert. denied, 126 S. Ct. 2286 (2006); *Cicio* v. *Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004); *DiFelice* v. *Aetna U.S. Healthcare*, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring).

Legal scholars have echoed the judicial concern that participants and beneficiaries cannot be left "betrayed without a remedy." Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827, 852 (2006); see, *e.g.*, John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1353-1362 (2003); Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights*, 18 Va. Tax Rev. 417 (1998); Jayne E. Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 Wash. U. L.Q. 671 (1994). Accordingly, this Court should correct the court of appeals' misinterpretation of Section 502(a)(3) and hold that make-whole monetary relief is available against fiduciaries who breach their ERISA duties.

D. Neither *Mertens* Nor *Great-West* Precludes Suits Under Section 502(a)(3) Against Fiduciaries For Monetary Redress Of Fiduciary Breaches

1. Contrary to the conclusion of the court of appeals (Pet. App. 9a-13a), suits under Section 502(a)(3) against fiduciaries for monetary redress of fiduciary breaches are fully consistent with this Court's decision in *Mertens*. *Mertens* was a suit against not a fiduciary but a third party who provided services to the plan.

As this Court explained, in contrast to fiduciaries, third-party service providers are not central to the ERISA regime. Unlike fiduciaries, they have "no real power to control" the actions of the plan. *Mertens*, 508 U.S. at 262. And ERISA does not expressly provide any remedies against them, whereas it provides an express remedy against fiduciaries for losses to the plan that result from a breach of their ERISA duties. See *id.* at 253. Given the peripheral role of third-party service providers and the absence of any express remedy, the Court concluded that Congress reasonably decided not to provide a damages action against them, particularly since monetary relief is available against fiduciaries. See *id.* at 262-263.

There is also less need for ERISA to provide monetary relief against third-party service providers because state-law remedies are generally available against those defendants. The courts of appeals "routinely find that garden-variety malpractice or negligence claims against non-fiduciary plan advisors, such as accountants, attorneys, and consultants, are not preempted" by ERISA, especially when the claims are brought by or on behalf of plans. *Gerosa* v. *Savasta & Co.*, 329 F.3d 317, 324 (2d Cir.) (citing cases), cert. denied, 540 U.S. 967, and 540 U.S. 1074 (2003). Those courts have reasoned that Congress did not intend "to preempt state laws that do not affect the relationships among" the "core ERISA entities: beneficiaries, participants, administrators, employees, trustees and other fiduciaries, and the plan itself." *Ibid.* Thus, claims against third-party service providers are generally not preempted unless they "'provid[e] alternate enforcement mechanisms' for employees to obtain ERISA plan benefits." *LeBlanc* v. *Cahill*, 153 F.3d 134, 147 (4th Cir. 1998) (citation omitted); *e.g.*, *Gibson* v. *Prudential Ins. Co.*, 915 F.2d 414, 418 (9th Cir. 1990). In contrast, state-law remedies against fiduciaries who have breached their fiduciary duties generally are preempted. See p. 22, *supra*.

In addition, unlike petitioner, who seeks the "'make whole' * * * equitable relief" provided by surcharge, Br. in Opp. App.

4a, the plaintiffs in *Mertens* did not seek equitable relief. See *Mertens*, 508 U.S. at 255 (plaintiffs "do not * * * seek a remedy traditionally viewed as 'equitable.'"). Although their claim—an action against a third party for participating in a breach of trust—was cognizable in equity, see Bogert § 870, at 135, they sought as a remedy "all damages according to proof" and "punitive damages." J.A. at 17, *Mertens*, *supra* (No. 91-1671). Compensatory and punitive damages, unlike surcharge, were typically available from courts of law rather than courts of equity. See *Mertens*, 508 U.S. at 255; p. 18-19, *supra* (discussing the differences between surcharge and legal damages).

As the Court noted in *Mertens*, courts of equity would sometimes provide legal remedies under the clean-up doctrine, see 508 U.S. at 256 (citing 1 Pomeroy § 181, at 257), but, under *Mertens*, the fact that equity would occasionally award legal remedies does not make those remedies "equitable relief" within the meaning of Section 502(a)(3). See *id.* at 256-258. Indeed, equity would sometimes award legal relief under the clean-up doctrine in suits against third parties who injured a trust. For example, if a third party committed a tort or a breach of contract against the trust, the appropriate remedy was an action by the trustee against the third party, which the trustee generally had to bring at law. Second Restatement § 280, at 38-42; Holcombe 22 n.2. If the trustee refused to sue, the beneficiary could sue the trustee in equity for breach of trust. Second Restatement § 282 & cmt. e, 44-45. In that suit, equity would permit the beneficiary to join the third party as a defendant, in order to avoid the need for multiple suits—one at equity by the beneficiary against the trustee and the other at law by the trustee against the third party. See *ibid.*; 4 Scott § 282.1, at 30. This Court may have viewed the relief sought by the plaintiffs against the non-fiduciary third party in *Mertens* as a kind of legal relief that equity courts would sometimes award under the clean-up doctrine. See 508 U.S. at 256-258.

Suits under Section 502(a)(3) to obtain redress for fiduciary breaches are also entirely consistent with this Court's decision in *Great-West*. Like *Mertens*, *Great-West* was not a suit by a participant against a fiduciary for breach of fiduciary duty. Instead, *Great-West* was in essence a suit by a plan against beneficiaries for breach of contract. The dispute in *Great-West* thus did not implicate the concern to protect the interests of plan participants and beneficiaries that led Congress to enact ERISA. See 534 U.S. at 221 (noting that Congress gave participants and beneficiaries broad rights to enforce plan terms, without placing any limitation on the nature of the permissible relief, but it provided more limited rights to plan fiduciaries). In addition, like the plaintiffs in *Mertens*, the plan in *Great-West* was not seeking the equitable remedy of surcharge. Rather, the plan was seeking compensation for the beneficiaries' failure to comply with a contractual obligation to reimburse the plan for a tort recovery from a third party. Although the plan argued that it sought the equitable remedy of restitution, the Court concluded that, in reality, the plan sought the legal remedy of money damages for breach of a contractual obligation. See *id.* at 210, 221.

2. The court of appeals adopted an unduly narrow construction of Section 502(a)(3) in large part because it misunderstood this Court's statements in *Mertens* and *Great-West* that "equitable relief" under Section 502(a)(3) is relief that was "*typically* available in equity." Pet. App. 7a (quoting *Mertens*, 508 U.S. at 256); see *Great-West*, 534 U.S. at 210 (quoting *Mertens*, 508 U.S. at 256). The court of appeals mistakenly reasoned that a remedy qualifies as "typically available in equity" only if equity courts awarded that remedy "*as a general rule*," rather than in certain cases or against certain defendants. Pet. App. 11a (quoting *Rego* v. *Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003)) (emphasis added by court of appeals); see *id.* at 12a-13a (concluding that the remedy sought by petitioner is not equitable because it was available only against fiduciaries who committed a breach of trust). But the Court in *Mertens* did not intend to exclude traditional

remedies in equity that were available only in relatively atypical factual scenarios. Rather, the Court intended to exclude remedies that were typically available only in courts of law, and not in equity, in the days of the divided bench.[5] The remedy of surcharge was not the kind of remedy that the Court intended to exclude. As discussed above, surcharge was not only *typically* available in courts of equity rather than courts of law; it was *exclusively* available in equity courts.

It would make little sense to conclude that a remedy, such as surcharge, which was available *only* in courts of equity, does not qualify as "equitable relief" because those courts imposed limits on its availability. Indeed, that conclusion cannot be squared with this Court's cases. For example, the Court held that the plan in *Sereboff* sought equitable relief even though equity would enforce an "equitable lien 'by agreement'" only against a defendant who had agreed to make specific property available to satisfy his obligation to the plaintiff. See 126 S. Ct. at 1875. Moreover, as the Court explained in *Great-West*, the equitable remedy of restitution was available only against a defendant who had possession of particular funds or property claimed by the plaintiff. See 534 U.S. at 214. And, in *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000), the Court stated that an action for restitution or disgorgement of profits against someone who had benefitted from a breach of trust qualified as equitable relief, even though that remedy was available only against a limited category of defendants—those who had

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[5] See *Mertens*, 508 U.S. at 255 (rejecting idea that money damages are equitable relief on the ground that they are "the classic form of *legal* relief"); *id.* at 256 (noting that, although equity courts sometimes awarded legal relief under the clean-up doctrine, such relief was generally provided by courts of law); *id.* at 258 (noting that Section 502 of ERISA, 29 U.S.C. 1132, distinguishes "between 'equitable' and 'legal' relief"); see also *Sereboff*, 126 S. Ct. at 1873-1877 (concluding that a plan's action to enforce a reimbursement provision "qualifies as an equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement," relief available in equity in the days of the divided bench).

received ill-gotten trust assets with knowledge "of the trust and the circumstances that rendered the transfer in breach of the trust." *Id.* at 251, 253. Thus, this Court has repeatedly held that a remedy was "typically available in equity," and therefore qualified as "equitable relief" under Section 502(a)(2), even though the remedy was available only in limited circumstances and against particular defendants.

That conclusion has particular force in this case, which unlike the prior cases considered by this Court, involves a remedy against a fiduciary for breach of fiduciary duties in managing plan assets—a subject at the very core of ERISA. ERISA was enacted against the backdrop of the law of trusts, and Congress specifically intended that the law of trusts would inform interpretation of the Act, including its remedial provisions. *Varity*, 516 U.S. at 502; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295 (1974). It therefore is especially appropriate for relief to be available against a breaching fiduciary under Section 502(a)(3) if it would have been available against a trustee in a court of equity.

The court of appeals also misinterpreted (Pet. App. 11a) statements in *Mertens* and *Great-West* that "equitable relief" does not include "whatever relief a court of equity is empowered to provide in the particular case at issue" or "all relief available for breach of trust at common law." *Mertens*, 508 U.S. at 256-258; *Great-West*, 534 U.S. at 210; see *id.* at 219 ("In *Mertens*, we rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)."). Those statements reflect the proposition that the legal remedies that equity courts sometimes awarded in trust cases under the clean-up doctrine do not in themselves constitute "equitable relief" under Section 502(a)(3). See *Mertens*, 508 U.S. at 256 (explaining that "there were many situations—not limited to those involving enforcement of a trust—in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority'" (quoting 1 Pomeroy § 181, at

257)). The remedy of surcharge was not, however, a legal remedy that courts of equity sometimes awarded under the clean-up doctrine. On the contrary, it was quintessential "equitable relief"—awarded only by courts of equity, for a claim over which courts of equity had exclusive jurisdiction.[6]

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[6] Respondents argue in their motion to dismiss the writ (at 3-6) that petitioner is no longer a "participant" because he withdrew the balance in his plan account in July 2006, and that the case is therefore moot. That contention is without merit. ERISA defines a "participant" as "any employee or former employee of an employer * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. 1002(7). Petitioner seeks an order requiring DeWolff to reimburse the plan for the losses he suffered as a result of DeWolff's alleged fiduciary breach. If petitioner prevails, the plan will obtain a recovery equal to the losses suffered by petitioner's plan account, and petitioner will have a claim for additional benefits to be distributed out of that recovery. Petitioner therefore is a former employee who "may become eligible to receive a benefit" from the plan if he prevails in his suit, and he is thus a "participant" under 29 U.S.C. 1002(7). See *Firestone*, 489 U.S. at 117-118 ("participant" includes "former employees who * * * have 'a colorable claim' to vested benefits"). For those reasons, the courts of appeals that have addressed the issue have allowed participants in defined contribution plans who have withdrawn their account balances to sue to recover investment losses caused by fiduciary breaches that occurred before the withdrawals. *Graden* v. *Conexant Sys., Inc.*, No. 06-2337, 2007 WL 2177170 (3d Cir. July 31, 2007); *Harzewski* v. *Guidant Corp.*, No. 06-3752, 2007 WL 1598097 (7th Cir. June 5, 2007); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan*, 883 F.2d 345, 347-350 (5th Cir. 1989).

In any event, whether petitioner is a "participant" and therefore has a statutory cause of action under Section 502(a), 29 U.S.C. 1132(a) (2000 & Supp. IV 2004), is a question on the merits that can be considered by the court of appeals on remand if this Court reverses the judgment below on one of the grounds urged by petitioner. It is not a question about whether there is a live case or controversy. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-90, 97 (1998); *Harzewski*, 2007 WL 1598097, at *3.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1002 of Title 29 (Section 3 of ERISA) of the United States Code provides, in pertinent part:

Definitions

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

* * * * *

2. Section 1104 of Title 29 of the United States Code (Section 404 of ERISA) provides, in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * * * *

(c) Control over assets by participant or beneficiary

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

* * * * *

3. Section 1109(a) of Title 29 of the United States Code (Section 409(a) of ERISA) provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * * *

4. Section 1132(a) of Title 29 of the United States Code (Section 502(a) of ERISA) provides, in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to

redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

* * * * *

5. Section 1144(a) of Title 29 of the United States Code (Section 514(a) of ERISA) provides:

Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * * *

Supreme Court, U.S.
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In The Supreme Court of the United States

JAMES LARUE,
Petitioner,
v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of nearly 39 million persons age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older persons. Countless members participate in or receive employer-funded health, pension, disability, and other employee and retiree benefit plans. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.[2/]

Given ERISA's preemptive force, *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004), it is imperative that participants have meaningful recourse under ERISA to protect their retirement savings where fiduciaries wrongfully interfere with earned benefits that may make a crucial difference in

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[1/] Pursuant to SUP. CT. R. 37.6, *amicus curiae* AARP states that no person or entity other than *amicus curiae*, and its undersigned counsel, made a monetary contribution to the preparation or submission of this brief and that no counsel for any party authored this brief in whole or in part. The written consents of the parties have been filed with the Clerk of the Court pursuant to SUP. CT. R. 37.2(a).

[2/] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving the scope of a fiduciary's duties as well as appropriate remedies under ERISA. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Milofsky v. Am. Airlines*, 442 F.3d 311 (5th Cir. 2006); *In re Schering Plough ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003).

employees' retirement security. The resolution of the issues herein will have a direct and vital bearing on individuals' ability to obtain those benefits which will foster their economic security. AARP, therefore, submits its brief *amicus curiae* to facilitate a full consideration by this Court of these issues.

SUMMARY OF ARGUMENT

If this Court affirms the Fourth Circuit's decision in its entirety, not only would 401(k) plan participants have no recourse to obtain monetary relief to their individual accounts under the Employee Retirement Income Security Act, but trillions of dollars in the 401(k) plan system would be effectively unregulated. AARP submits, however, that a claim like the one at issue here – for breach of fiduciary duty for failing to follow investment instructions – asserts a claim for a breach of a fiduciary's statutory duties under ERISA, and therefore the claim is cognizable under ERISA § 502(a)(2) for relief to the plan as a whole. If this Court were to hold that the claim does not meet the parameters to state a claim under ERISA § 502(a)(2), then AARP submits that the claim is cognizable under ERISA § 502(a)(3) because the basis of the claim – breach of fiduciary duty by a beneficiary against a fiduciary – and the nature of the underlying remedy sought are both equitable, and thus the claim requests a category of relief that was typically available in equity.

ARGUMENT

I. AFFIRMANCE OF THE FOURTH CIRCUIT'S DECISION IN ITS ENTIRETY WILL DISCOURAGE PARTICIPATION IN 401(K) PLANS AND LEAVE TRILLIONS OF DOLLARS IN THE BENEFIT SYSTEM EFFECTIVELY UNREGULATED.

As of the end of the first quarter of 2007, employer-sponsored defined contribution plans held $3.26 trillion in assets, *Flow of Funds Accounts of the United States, Flows and Outstandings First Quarter 2007*, FEDERAL RESERVE STATISTICAL RELEASE at Table L. 118.c (June 7, 2007), with $2.698 trillion in 401(k) plans. Investment Company Institute, *Frequently Asked Questions About 401(k) Plans*, *available at* http://www.ici.org/home/faqs_401k.html (June 2007). Since 1981, the number of 401(k) plans has significantly increased, making defined contribution plans the nation's primary retirement savings vehicle. PETER BRADY & SARAH HOLDEN, *The U.S. Retirement Markets, 2006*, RESEARCH FUNDAMENTALS (Investment Company Institute, Washington, D.C.), July 2007, *available at* http://www.ici.org/pdf/fm-v16n3.pdf. However, participation in 401(k) plans has never been universal. Bureau of Labor Statistics, U.S. Department of Labor, *National Compensation Survey: Employee Benefits in Private Industry in the United States, Aug. 2006*, at 2, *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf. Moreover, evidence suggests that many workers are failing to contribute a sufficient amount to meet their retirement income needs. A. Munnell, A. Webb & F. Golub-Sass, Center for Retirement Research at Boston College, *Is There Really A Retirement Savings Crisis? An NRRI Analysis* at 2 (No. 7-11 Aug. 2007), *available at* http://crr.bc.edu/images/stories/Briefs/ib_7-11.pdf. Last year, Congress took steps to encourage increased

participation in 401(k) plans as well as to promote increased contributions. *See* Pension Protection Act of 2006, H.R. Res. 4 §§ 902(a) (b), (d)(1) 109th Cong. (2006) (enacted) (401(k) automatic contribution arrangements).

If, in order to bring suit under Section 502(a)(2) of ERISA for breaches of fiduciary duty, all participants of a plan must suffer a loss to their plan accounts, the only remaining option for these participants will be to attempt to remedy fiduciary breaches on an individual basis under ERISA § 502(a)(3). However, if the Court interprets ERISA § 502(a)(3) - the subsection of ERISA authorizing individual claims for fiduciary breach - to exclude such participants from seeking monetary relief for breaches of fiduciary duty, then the Court will effectively foreclose all monetary relief to 401(k) plan participants, without regard to the gravity of the fiduciary breach or the magnitude of the resulting loss.

Complete affirmance of the Fourth Circuit's opinion threatens Congress' recent attempts to increase participation in and contribution amounts to 401(k) plans.[3/] While it is accepted that 401(k) participants assume investment and mortality risk when they participate in 401(k) plans, *see* MARC KRONSON, *Employee Costs and Risks in 401(k) Plans*, COMPENSATION AND WORKING CONDITIONS (Summer 2000), *available at* http://www.bls.gov/opub/cwc/archive/summer2000art2.pdf., no one expects that they will have to assume the risk of the fiduciary's potential malfeasance and negligence. Participants are well aware of the recent dramatic losses in retirement savings held in 401(k) plans due to corporate scandals such as WorldCom and Enron. And, they

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[3/] Injunctive relief does not restore monetary losses to participants. To use an analogy, it removes the hand from the cookie jar, but does nothing to replenish the cookies.

have firsthand experience of the impact when there is a market down turn. AARP, IMPACT OF STOCK MARKET DECLINE ON 50-70 YEAR OLD INVESTORS, *available at* http://research.aarp.org/econ/market_decline.html (December 2002) (explaining that many individuals over the age of 50 postponed their retirements, returned to work, looked for work after their retirements, or made other adjustments in their lifestyles). If participants know that they have no recourse in the event that plan fiduciaries cause them to lose all or part of their retirement monies, many workers may well question not only their level of contributions, but also their initial or continued participation in 401(k) plans.

Finally, during the last twenty-five years, the American employee benefit system has evolved so that individuals are being required to take more responsibility for their retirement and health benefits.[4/] *See generally* GAO, EMPLOYER-SPONSORED HEALTH AND RETIREMENT BENEFITS: EFFORTS TO CONTROL EMPLOYER COSTS AND THE IMPLICATIONS FOR WORKERS at 3-4, 7-8 (GAO-07-355, March 2007). It seems absurd that these plans – with trillions of dollars in them – would be the ones that Congress would leave unregulated in the employee benefit system.

Given the circumstances from which ERISA arose, Congress could not have intended to leave 401(k) participants with no remedy for monetary losses if fiduciaries breach their duty to participants. Nor could Congress have intended to leave 401(k) plans – with their trillions of dollars – so unregulated. *See generally* James. A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-*

[4/] Although AARP has focused on 401(k) plans in its brief due to the facts of this case, the problems suggested would be similar for employee contributory health plans including Health Savings Accounts.

Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683 (2001).

II. SECTION 502(a)(2) AUTHORIZES A PLAN PARTICIPANT TO RECOVER MONETARY LOSSES TO AN INDIVIDUAL ACCOUNT.

A. The Court Should Refuse To Read Limitations Into ERISA § 502 Where None Are Stated.

Congress enacted ERISA to protect the interests of participants and their beneficiaries in employee benefit plans by setting out substantive regulatory requirements for employee benefit plans including standards of conduct, responsibility, and obligation for fiduciaries and to provide for appropriate remedies, sanctions, and ready access to the federal courts. ERISA § 2(b), 29 U.S.C. § 1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. at 208; *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993). When employers establish employee benefit plans, they must abide by these standards. Congress' purpose was to ensure that employees would receive the retirement benefits they were promised. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

Congress enabled participants to protect the financial integrity of their plans, and thus their benefits, through ERISA's civil enforcement provisions. When interpreting ERISA § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which it was crafted, the structure of the statute, and the policies underlying ERISA. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (this Court is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA"). The Court concluded that the precise language of

the statute must be followed. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens*, 508 U.S. 248; *Russell*, 473 U.S. 134. As a result, the Court has refused to infer claims for relief and remedies which are not specifically enumerated in these civil enforcement provisions. *Mertens*, 508 U.S. at 253; *Russell*, 473 U.S. at 147. Conversely, the Court has refused to read in limitations to these civil enforcement provisions where there are none stated in § 502(a)(2). *Harris Trust*, 530 U.S. at 246. This case should be treated no differently. No limitation should be read into §§ 502(a) and 409 based on the type of plan that is involved in the alleged breach of duties by a plan fiduciary.

Section 502(a)(2) permits a civil action to be brought "by a participant, beneficiary or fiduciary for appropriate relief under 409." 29 U.S.C. § 1132(a)(2). Section 409 provides that any relief, whether legal or equitable, to remedy a fiduciary breach will flow to the "plan." 29 U.S.C. § 1109. "[T]here is no basis whatsoever in this statutory framework to preclude suits by participants and beneficiaries against fiduciaries who breach their statutory duties, regardless of . . . the many factual intricacies that determine the nature of an employee benefit plan." Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 225 (2004).

By its plain terms, § 409 does not differentiate among different types of ERISA plans. Indeed, a "plan" includes retirement as well as welfare plans. ERISA § 3(3), 29 U.S.C. § 1002(3). Moreover, Congress clearly knew how to differentiate between the two types of pension plans where it intended to do so. *Compare* ERISA § 3(35), 29 U.S.C. § 1002(35) (defined benefit plan definition) *with* ERISA

§ 3(34), 29 U.S.C. § 1002(34) (individual account plan definition); IRC § 415(b), 26 U.S.C. § 415(b) (benefit limitations for defined benefit plans) *with* IRC § 415(c), 26 U.S.C. § 415(c) (contribution limitations for defined contribution plans). Congress made no such differentiation in types of plans in the terms of § 409. *See Inter-modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 514-15 (1997) ("Had Congress intended . . . , it could have easily" done so).

Nor does § 409(a) distinguish between different types of losses to a plan. ERISA requires fiduciaries to compensate for "any losses" to a plan, without specifying if losses affect the entire plan, a major part of the plan, or only an insignificant part of the plan. 29 U.S.C. § 1109(a). The remedial provision of the statute is blind to the number of beneficiaries who have suffered loss the magnitude of their losses.

The only limit to the application of these civil enforcement provisions is that suits must be brought against a fiduciary. In *Russell*, the Court explained:

> It is of course true that the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance

> of proper records, the disclosure
> of specified information . . . .

473 U.S. at 142-143; *see also id.* at 142 n.9. Accordingly, if the asserted claims against the fiduciaries fall within the duties imposed on them by ERISA, relief is available under §502(a)(2). LaRue's claim, arising out of the fiduciary's alleged failure to discharge its duties to direct the investment of his account assets in accordance with his instructions, as prescribed under the terms of the plan, plainly meets *Russell*'s test for § 502(a)(2) relief. *Compare Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983) (alleging breach of fiduciary duty under § 502(a)(2) for failure to investigate investments) *with Harris Trust*, 530 U.S. 238 (alleging knowing participation of non-fiduciary in a fiduciary breach under § 502(a)(3)).

B. Merely Because A Recovery Is Eventually Distributed to a Participant's Individual Account Does Not Mean the Recovery Was Not on Behalf of the Plan.

ERISA defines LaRue's 401(k) as "a pension plan which provide[s] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." ERISA § 3(34), 29 U.S.C. § 1002(34).

An employer sponsoring a defined contribution plan does not establish a separate plan for every participant. Rather, an employer establishes one plan to which contributions are made on behalf of the employees who participate in the plan. 1 Michael J. Canan, QUALIFIED RETIREMENT PLANS § 3.1 (Practitioner ed. 1999). These "contributions are made to a

single funding vehicle, usually a trust," and "as amounts are contributed to the trust, they are allocated to the participant's account." DAVID A. LITTEL *et al.*, RETIREMENT SAVINGS PLANS: DESIGN, REGULATION, AND ADMINISTRATION OF CASH OR DEFERRED ARRANGEMENTS 6 (1993). Indeed, in order to be considered a qualified plan to render contributions tax deductible and to meet ERISA's fiduciary requirements, pension plans including 401(k) plans and Employee Stock Ownership Plan must be established as trusts. IRC § 401(a), 26 U.S.C. § 401(a); ERISA § 403, 29 U.S.C. § 1103. Accordingly, the trust as a separate legal entity holds any contributions and gains on those contributions for the beneficial interest of the trust's participants and beneficiaries. RESTATEMENT (SECOND) OF TRUSTS § 3 (1959) (hereinafter "RESTATEMENT").

Generally, the participant account is not actually an account in the conventional sense; it is simply "a bookkeeping entry" in which there is a separate entry in the plan for each participant. Littel, *supra* at 6. The actual plan, therefore, is made up of the individual accounts, and "the sum of all of the account balances . . . equals the total market value of the plan's assets." DAN M. MCGILL *et al.*, FUNDAMENTALS OF PRIVATE PENSIONS 247 (7th ed. 1996). All assets of these individual accounts are owned by the plan and held by the trustee for the benefit of each participant.

Where a suit seeks to recover for losses to an individual's account, the recovery will benefit the plan as a whole because the plan receives recovery proceeds to be allocated to account holders as appropriate. The plan fiduciary then credits the accounts of participants according to their respective interests in the recovery. Although funds are distributed to individual accounts, the funds are also subject to pro-rated charges on account to be applied toward the payment

of plan expenses, thereby benefiting all participants. *In re Schering-Plough Corp. ERISA Lit.*, 420 F.3d 231, 235 (3d Cir. 2005). The only access participants have to the award is through their plan accounts. Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REF. 469, 539 (2001). While the award may be distributed disproportionately among the respective individual accounts, the recovery is for the plan as a whole. Not only does the recovery for breach of fiduciary duty increase plan assets, but it also reinforces the integrity of the plan as a whole, thus benefiting each plan participant.

Notably, the Department of Labor's plan asset regulation concerning the transmission of participant contributions to plans is consistent with how 401(k) plans actually work and the language of § 409. *See* Regulation Relating to Definition of "Plan Assets" Participant Contributions, 61 FED. REG. 41,220 (Aug. 7, 1996) (codified at 29 C.F.R. § 2510.3-102 (1996)). Throughout the preamble, the Department makes clear that commentators understood the difference between transmitting contributions to the plan versus allocating contributions to the participants' individual accounts. *See, e.g., id.* at 41,221 ("[C]ommenters stated that each time participant contributions are transmitted to the plan, eligibility must be confirmed, contributions must be allocated to the participants' individual accounts, and the individual amounts must be reconciled to the aggregate amount."); *see also id.* at 41,222 ("Many commenters recognized that participant contributions could be segregated quickly and frequently into a trust established to temporarily hold participant contributions until they could be reconciled in a more practical and less costly manner.").

Although some defined contribution plans may be participant directed (such as 401(k) plans) so that the

participant chooses the manner in which the contributions are invested, other defined contribution plans such as money purchase plans invest the employer contributions for participants. *See* Canan, *supra* at § 3.11 ("[E]ven though the employer contribution . . . is credited to separate accounts for each employee, the trustee invests all of the funds in one certificate of deposit."). Congress recognized no distinction between types of plans and the manner in which investments are handled in different types of plans. *See* ERISA § 409; ERISA § 3(3); ERISA § 3(34). Rather, the distinction between the types of plans is made relevant only in § 404(c), which limits potential fiduciary liability in circumstances where a participant exercises control over the assets in his or her individual account.

C. The Determinative Factor for Whether a Suit Is Being Brought on Behalf of the Plan Is Not the Number or Percentage of Plan Participants Who May Be Injured, But Whether the Fiduciary's Statutory Duties Are Implicated.

Assessing whether a claim seeks to recover for the plan as a whole based on how many participants are affected, rather than based on whether recovery would go through the plan itself, has led to inconsistency among the circuits, not to mention analytical confusion. Many claims of fiduciary breach in connection with the administration of individual account plans will not affect every member of the plan to the same extent, as investments may vary from one account to another. Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. at 232. Some courts have emphasized a requirement that the "suit stands to benefit a large number of" participants, without defining "a large number." *Rogers v. Baxter Int'l, Inc.*, 417 F. Supp. 2d 974, 981 (N.D. Ill. 2006). Others have allowed suits

to go forward without any discussion of the size of the subset of affected participants, while still other courts have refused to allow claims in which dozens of participants were affected. *Compare Kuper v. Lovenko*, 66 F.3d 1447 (6th Cir. 1995) *with Mattassarin v. Lynch*, 174 F.3d 549, 565-66 (5th Cir. 1999).

A hypothetical offered by Professor Medill clearly demonstrates the reasons this Court should reject as a determinative factor in bringing a suit under § 502(a)(2) the distinction between a breach affecting all plan participants and one affecting only some. Professor Medill posits a scenario in which plaintiff-participants seek to recover either for investment expenses wrongly deducted from their accounts or for losses to the principal balance of their respective accounts. Assume further that because different investment options are available to participants in the plan, the breach may or may not affect the accounts of all participants in the plan. It is most likely that it will affect the participants unequally because the fees or losses will differ depending on each individual's investment allocations. Colleen E. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REF. at 537. In evaluating the remedy necessary to restore the losses to the plan, the court will have to analyze the amount of damage to each individual account. *Id.* at 538. The calculation of damages to the plan is driven by the total dollar sum that was invested in the challenged investment vehicle rather than by the number of investors who selected that investment vehicle. The latter fact is irrelevant to consideration of whether the plan has suffered losses and to what extent.

Consequently, LaRue's breach of fiduciary claim for failing to follow his instructions to direct his investment of his account assets is cognizable under ERISA § 502(a)(2).

III. MONETARY RELIEF FOR A PARTICIPANT'S CLAIM AGAINST A FIDUCIARY FOR A BREACH OF ITS DUTY WAS TYPICALLY AVAILABLE IN EQUITY AND THEREFORE IS "EQUITABLE RELIEF" WITHIN THE MEANING OF ERISA § 502(A)(3).

A. The Basis for a Participant's Claim Against a Fiduciary for a Breach of Its Duty Is Always Equitable.

ERISA § 502(a)(3) permits participants to obtain "appropriate equitable relief" against plan fiduciaries to redress breaches of fiduciary duty. 29 U.S.C. § 1132(a)(3); *see also Varity*, 516 U.S. at 510. The Court has limited equitable relief under this section to "those categories of relief that were *typically* available in equity."[5/] *Mertens*, 508 U.S. at 256 (emphasis in original); *accord Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1873 (2006); *Great-West*, 534 U.S. at 210.

In *Great-West,* the Court emphasized that whether a remedy was typically available in equity "depends on the basis for the plaintiff's claim and the nature of the underlying

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[5/] "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (providing for the restoration of lost wages in a Fair Labor Standards Act case). Indeed, absent a clear command by Congress that a statute providing equitable relief excludes certain forms of relief, a court should presume that it has the discretion to exercise the full scope of equitable powers. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *accord Edelman v. Jordan*, 415 U.S. 651, 672 n.15 (1974).

remedies sought." *Great-West*, 534 U.S. at 213 (quotations omitted); *accord Sereboff*, 126 S. Ct. at 1874-75.

For analysis of participant claims against a fiduciary for breach of its duty, unlike claims in *Sereboff*, *Great-West* and *Mertens*, the common law of trusts must be the starting point, unless trust law is inconsistent with ERISA's language, structure, or purpose.[6] *See, e.g., Harris Trust*, 530 U.S. at 250; *Varity*, 516 U.S. at 497; *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA).

Unmistakably, any claim of a breach of fiduciary duty is based on trust law, and there is no doubt that such claim is always equitable. RESTATEMENT §§ 2, 2 cmt. b (1959) ("A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title of the property is held to equitable duties . . ."). Thus, because LaRue's claim is a classic breach of fiduciary duty claim, it does not "falter" due to the basis of his claim. *Sereboff*, 126 S.Ct. at 1874.

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[6] Congress enacted ERISA because it found "that the common law of trusts did not offer completely satisfactory protection" to participants. *Varity*, 516 U.S. at 497.

B. The Nature of the Underlying Remedies Sought in this Case Are Equitable Because the Remedies of a Beneficiary Against a Trustee Are Always Equitable.

1. Standard current works conclude that the nature of underlying remedies for beneficiary claims against a fiduciary for breach of its fiduciary duty are always equitable.

To determine what relief was typically available in equity, the Court stated that "standard current works" including Dobbs and the Restatements would provide the answer. *Great-West*, 534 U.S. at 217. The failure of the court below to make this historical inquiry resulted in a misreading of *Mertens*, *Great-West*, and *Sereboff* in determining the nature of the underlying remedies sought by LaRue.

The Restatement of Trusts underscores that "the remedies of the beneficiary against the trustee are *exclusively equitable*." RESTATEMENT § 197 (emphasis added); *see also id.* § 199 (setting forth "equitable remedies of beneficiary"). As Professor Bogert explains:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with *whatever remedy is necessary* to protect him and recompense him for loss, in so far (*sic*) as this can be done without injustice to the trustee or third parties.

> The court is not confined to a limited list of remedies but rather will mold the relief to protect the rights of the beneficiary according to the situation involved. *If equity cannot give the beneficiary the exact benefit to which the trust would entitle him, it will provide him the best possible substitute.*

GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 861, at 3-4 (rev. 2d ed. 1995) [hereinafter "BOGERT"] (emphasis added); *see also* A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 199.3, at 203-04, 206 (4th ed. 1988) (hereinafter "SCOTT & FRATCHER") (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). Indeed, not only does the Restatement specifically provide that a beneficiary can maintain a suit to compel the trustee to perform his duties, but it also provides that suit may be brought to compel the trustee to redress any breach of trust. Such suits and the ensuing remedies are *always* equitable. RESTATEMENT §§ 197, 199 (a) & (c); *accord* SCOTT & FRATCHER, §§ 201, 205, at 219, 237 (where the trustee commits a breach of trust, the beneficiary can charge the trustee with any loss that resulted from the breach of trust); BOGERT § 862, at 34 (trustee may be directed by the court to pay damages to the beneficiary out of the trustee's own funds). Because the fiduciary-beneficiary relationship "is an obligation arising out of equity's demands on the conscience to act for the benefit of another person," Dan Dobbs, LAW OF REMEDIES § 10.4 (2d ed. 1993), it creates equitable rights and duties. When those duties are breached, all remedies ordered by the court are considered equitable

remedies. RESTATEMENT §§ 197, 199 (a) & (c); *accord* SCOTT & FRATCHER §§ 201, 205, at 219, 237; BOGERT § 862, at 34.

Accordingly, a beneficiary may obtain monetary relief against a fiduciary for a breach of trust generally and a breach of the duty of loyalty. *See* RESTATEMENT §§ 205, 206, cmts. and illus.; *see* SCOTT & FRATCHER § 199.1, at 206 (if the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel the trustee to redress the breach of trust by any means including the payment of money). A fiduciary can be ordered to restore the beneficiary to the position he or she would have been in but for the breach of trust. "If the [fiduciary's] breach of trust causes a loss, ..., the beneficiaries may surcharge the [fiduciary] for the amount necessary to compensate fully for the consequences of the breach." *See* RESTATEMENT § 205 cmt. a. Similar to the facts here, the Restatement illustrates the scenario where the fiduciary was negligent in the handling of the beneficiary's money, causing a loss to the beneficiary; in that case, the fiduciary was liable to the beneficiary for the total amount of the loss. *See id.*, illus. 1, 5.

As the Restatement plainly shows, merely because such a remedy includes a monetary award does not change its character as an equitable remedy. In accord is *Clews v. Jamieson*, 182 U.S. 461 (1901), where the Court found that a claim solely for money against a trustee for breach of its duty was equitable and refused to dismiss the claim on the basis that there was no adequate remedy at law. *Id.* at 478-79. Claims against a trustee are always equitable even if the final relief consists of money to be distributed "among all the beneficiaries who are entitled to share therein." *Id.* at 480.

Because LaRue's claim arises from a breach of the fiduciary-beneficiary relationship, the standard works

uniformly point to the conclusion that the nature of his underlying remedy -- monetary relief or surcharge -- is equitable.[7] *Great-West*, 534 U.S. at 213; *Sereboff*, 126 S. Ct. at 1874.

2. Supreme Court precedent on ERISA remedies is consistent with the standard works.

None of the Court's precedent concerning remedies under § 502(a)(3) – *Mertens*, *Great-West*, and *Sereboff* – held that monetary relief granted by a court of equity was outside of the panoply of equitable remedies under ERISA. Indeed, *Sereboff* unabashedly permitted monetary relief.

Mertens held, however, that a suit against a non-fiduciary for money was not equitable relief. 508 U.S. at 268. *Mertens* stressed that the inherent nature of the relief sought was dispositive, and in that case, plaintiff did not produce an independent basis establishing the equitable character of the relief he sought. *Mertens*, 508 U.S. at 256.

Great-West elaborated on the Court's position in *Mertens*, holding again that a general contractual claim against a non-fiduciary is a request for legal damages. 534 U.S. at 210. The Court emphasized that whether a remedy was equitable depends on the basis for the claim and "the nature of the underlying remedies sought." *Id.* at 213. Because Great-West

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[7] A court should "enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust." *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978). The appropriateness of the remedy will depend on numerous factors including the extent of the deviation from the terms of the trust and the practical availability of the various remedies. RESTATEMENT § 214 cmt. 2.b; *see generally* BOGERT § 861.

merely requested personal liability for the amount of the benefits provided to the Knudsons, neither a constructive trust nor an equitable lien could be imposed on any specific property in the defendants' possession so that the requested relief did not meet the parameters of equitable restitution and the suit was not cognizable under ERISA § 502(a)(3). *Id.* at 214, 221. Here, unlike *Great-West*, there is no underlying contractual obligation involved.

Similar to the facts in *Great-West*, *Sereboff* arose in the context of a claim for reimbursement of benefits to the plan on account of the participant's recovery from a third-party tortfeasor. 126 S. Ct. at 1872-73. In contrast to *Great-West* where the prayer for relief was one for personal liability for a general contract obligation, in *Sereboff* Mid Atlantic sought specifically identifiable funds over which a constructive trust or equitable lien could be placed. *Id.* at 1871. Relying on case law from the days of the divided bench, the Court held that the basis for the relief sought was clearly characterized as equitable -- an equitable lien by agreement. *Id.* at 1874-75. Thus, the claim in *Sereboff* met both prongs of the historical inquiry in *Great-West* -- the basis of the claim and the nature of its underlying remedy were both equitable.[8] *Id.*

In contrast to LaRue's claim here, neither *Mertens*, *Great-West*, nor *Sereboff* involved a beneficiary suing a

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[8] *Sereboff* is consistent with the meaning of "redress" which is used in Section 502(a)(3). "Redress" is defined as relief, compensation, or satisfaction for a wrong or injury, and its etymology indicates that it was interpreted to include monetary relief. Definitions from Dictionary.com, Redress, *available at* http://dictionary.reference.com/browse/redress. Interpreting redress to allow monetary relief is consistent with decisions from the divided court. *See, e.g., Marshall v. Knox*, 83 U.S. 551, 559-60 (1872); *see also* Oxford English Dictionary, Redress, available at www.oedonline.com.

fiduciary for a breach of its duty. *Mertens* distinguished between fiduciaries and non-fiduciaries, stating that although under the common law of trusts damages could be obtained from third-party non-fiduciaries for knowing participation in the trustee's breach of fiduciary duty, "only the trustee had fiduciary duties." *Mertens*, 508 U.S. at 262. Because ERISA uses a functional definition of fiduciary, more entities are covered under ERISA as fiduciaries than under the common law of trusts. Thus, consistent with the historical practice in courts of equity, more remedies should be available under ERISA against fiduciaries than against non-fiduciaries. This conclusion is consistent with the Court's allocation of liability between fiduciaries and non-fiduciaries based on the amount of control they have over the plan. *See id.* (ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds."); *accord Harris Trust*, 530 U.S. at 251 (ERISA may place greater limitations on remedies against parties "other than the principal wrongdoer," *e.g.*, the breaching fiduciary, including a showing that the non-fiduciary had been unjustly enriched with trust assets).

Finally, this analysis reconciles *Mertens* with *Varity* and *Great-West*. In citing ERISA § 2(b), the Court recognized ERISA's basic purposes favors a reading of § 502(a)(3) to provide participants with a remedy against fiduciaries. *See Varity*, 516 U.S. at 513. The Court further stated that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm *individuals* by denying injured beneficiaries a remedy." *Id.* (emphasis added). The undisputed equitable relief the *Varity* participants were seeking, among other things, included reinstatement into the plan and monetary relief. *See Great-West*, 534 U.S. at 221 n.5.

Here, the nature of the underlying remedy sought from the defendant fiduciary – monetary relief or surcharge – nestles comfortably within the bounds of ERISA's concept of "equitable relief." *See* RESTATEMENT §§ 197, 199(a) & (c); *accord* SCOTT & FRATCHER, §§ 201, 205 at 219, 237.

Therefore, because the basis for LaRue's claim for breach of fiduciary duty against the defendant-fiduciary is equitable and the nature of the underlying remedy that he seeks is equitable, his claim is cognizable under ERISA § 502(a)(3).

CONCLUSION

AARP submits that LaRue's claim here is eligible for relief under ERISA §§ 502(a)(2) and 409. If the Court determines that LaRue does not satisfy the requirements of those provisions, then AARP submits that § 502(a)(3) provides a sound basis for relief. For the reasons stated above, AARP respectfully urges the Court to reverse the decision of the Fourth Circuit Court of Appeals.

August 7, 2007

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JAMES LaRUE,

Petitioner,

v.

DeWOLFF, BOBERG & ASSOCIATES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL[1]

The Air Line Pilots Association, International ("ALPA") is the largest union of airline pilots in the world and serves as collective bargaining representative for approximately 60,000 airline pilots employed by 41 air carriers in the United States and Canada. The vast majority of these pilots participate in individual account defined contribution pension plans. For many, the individual account plans have now become their sole retirement vehicle. ALPA therefore has a critical stake in the protection of the interests of participants in such plans and respectfully submits this brief urging reversal of that portion of the circuit court's decision holding that the petitioner, a participant in an individual account plan, could not recover on account of the plan fiduciary's failure to follow his asset allocation instructions because, in the opinion of the court, Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1132(a)(2), "provides remedies only for entire plans, not for individuals."[2] (Pet. App. at 2a.) The Fourth Circuit's decision substantially impairs the ability of

1. Letters of consent to the filing of this brief have been filed with the Clerk of Court. This brief was not written in whole or in part by counsel for a party. No person or entity other than ALPA made a monetary contribution to the preparation or submission of the brief.

2. ALPA believes that the dismissal of the petitioner's complaint should be reversed on the ground that he stated a cause of action under ERISA Section 502(a)(2), 29 U.S.C. §1132(a)(2), and that consideration of the Fourth Circuit's ruling regarding ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3), is therefore not necessary. Accordingly, ALPA will not address that portion of the court's decision.

pilots and other defined contribution plan participants to remedy fiduciary breaches that reduce the assets in their plans. If allowed to stand, the decision may undermine the ability of individuals to accumulate adequate retirement savings in such plans, which have become prevalent both in the airline industry and throughout the economy generally.

Like employees throughout the economy, airline pilots have come to rely to an increasing extent on defined contribution plans for retirement. But pilots are particularly vulnerable to the inherent risks such plans pose to employees. In the past six years following the September 11 attacks, four of the five largest carriers have filed for bankruptcy. In each of these massive reorganizations, the pilots have entered into concessionary agreements that either froze or terminated their defined benefit pension plans. *See, e.g.*, *In re UAL Corp.*, 468 F.3d 456, 460 (7th Cir. 2006) (Posner, J.) (noting that without the pilots' concessions, including the termination of their defined benefit plan, United might have liquidated); *In re US Airways Group, Inc.*, 296 B.R. 734, 744 (Bankr. E.D. Va. 2003) (noting the necessity of terminating the pilots' defined benefit pension plan and acknowledging the magnitude of the pilots' sacrifices).

Historically, pilots, like many employees, relied on traditional defined benefit pension plan benefits for a secure retirement. In addition, at various carriers, the pilots had negotiated supplemental defined contribution plans, including 401(k) plans, such as the one at issue in this case. Now, however, most of ALPA's membership rely on defined contribution plans because their defined benefit plans have been either frozen (meaning participants no longer accrue benefits in them), or terminated and taken over by the Pension Benefit Guaranty Corporation (the "PBGC"). For instance,

US Airways, United Airlines, and Delta Airlines have all terminated their pilots' defined benefit plans, causing their pilots to lose up to seventy-five percent of the retirement income they had earned over the course of their careers. *See* Testimony of ALPA President John Prater, Before Congress, Retirement Security: Strengthening Pension Protections (May 3, 2007) http://www.alpa.org/Default.aspx?tabid=206 (last visited Aug. 3, 2007); *see also* Testimony of Bradley D. Belt, Executive Director, Pension Benefit Guaranty Corporation, Before the Subcommittee on Aviation, Committee on Transportation & Infrastructure, United States House of Representatives (June 22, 2005) http://www.pbgc.gov/media/news-archive/testimony/tm13159.html (last visited Aug. 3, 2007) (noting that as a result of the pilots' defined benefit plan termination at United Airlines, "[s]ome participants or their survivors may see benefits reduced by half or more because of statutory limits" on the PBGC pension guarantees).

Where traditional pensions have been frozen or terminated, ALPA has negotiated for new or increased employer contributions to individual account plans, attempting to preserve retirement security for its members. If current trends continue, the next generation of pilots may participate exclusively in individual account plans. Even now, pilots' predominant retirement coverage, like the rest of the country, is through individual account plans. Every carrier employing ALPA pilots sponsors an individual account plan, making these plans a key component of an ALPA pilot's compensation package and a critical subject in collective bargaining. Moreover, like the petitioner in this case, pilots typically participate in self-directed plans, where the individualized investment decisions of the participants make it likely that fiduciary breaches will affect single participants or small groups.

Individual account plans by definition impose greater risks on participants than do defined benefit plans. Depriving participants in such plans of the ERISA remedies that Congress provided for all pension plan participants unjustifiably exacerbates the vulnerabilities employees in individual account plans face. In defined benefit plans, participants accrue benefits through continued employment, and participants are guaranteed a specified periodic benefit regardless of the performance of the plan's investments. The risk that plan assets will not be sufficient to pay promised benefits falls on the employer, which funds the plan. By contrast, in an individual account plan, where the employer's obligation is limited to contributing only a specified amount to the plan, benefits are not guaranteed, and the investment risk falls on the employee, who may be left with an account upon retirement that is significantly less than the amount needed for an adequate retirement income. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999) (explaining differences between defined benefit and defined contribution plans).

Pilots are particularly vulnerable to the inherent risks of individual account plans, as well as to the possibility of unremedied breaches of duty by plan fiduciaries. Commercial pilots possess highly specialized job skills that require years of training and development and previous aviation experience. They therefore typically start their careers later in life than other workers and, at the same time, must retire early since they are subject to federal mandatory retirement at age 60. 14 C.F.R. §121.383(c). Thus, pilots have a shorter career span in which to save for retirement in such plans. In addition, pilots face a greater risk of job interruption due to disability than other workers. Pilots are subject to periodic medical certification, and medical conditions that may not

be disabling in other professions, such as diabetes or myocardial infarction, can ground a pilot temporarily or permanently.

In short, pilots typically must earn their retirement benefits over a shorter period of time, and with more frequent interruptions, than others in the workforce. Pilots thus have a particular need for ERISA's safeguards against fiduciary breaches because they may not have sufficient time to recover resultant losses. This need has only increased over the last decade with the proliferation of individual account plans and the elimination of defined benefit plans. By depriving individual account plan participants of ERISA's protections, the Fourth Circuit's decision frustrates the national goal of encouraging retirement savings. *See, e.g.*, Department of Labor Retirement Savings Education Campaign - Saving Matters http://www.dol.gov/ebsa/savingmatters.html (last visited Aug. 3, 2007).

In sum, ALPA has a vital interest in this Court overturning the Fourth Circuit's decision to ensure that individual account plan participants are afforded the protections supplied by ERISA against fiduciary breaches that diminish the assets in their plan as a whole, and their individual accounts in particular.

SUMMARY OF THE ARGUMENT

In this case, the Fourth Circuit ruled that a single participant in an individual account plan has no remedy under ERISA Section 502(a)(2) for a fiduciary breach that reduces the assets in the plan because any recovery will be allocated only to the participant's account. The court's reasoning finds no basis in the statute, and is contradicted by the legislative history and unsupported by this Court's precedent. ERISA Section 502(a)(2) provides for relief to "a participant" for "any loss" caused by "any" fiduciary breach. 29 U.S.C. §1132(a)(2). Accordingly, whether the recovery will be allocated to every participant's account in the plan, or allocated solely to a single participant's account, has no bearing on Section 502(a)(2) standing. As long as the recovery is sought to the plan for a breach affecting any account in the plan, as in this case, Section 502(a)(2) provides a remedy. The legislative history indicates that Congress intended this outcome. And this Court has already recognized in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), that Section 502(a)(2) provides a cause of action in cases like this one. For these reasons, ALPA respectfully requests that this Court reverse the Fourth Circuit's ruling.

ARGUMENT

I. The Fourth Circuit's Decision Conflicts With the Statutory Text

The Fourth Circuit's ruling that ERISA Section 502(a)(2) does not provide relief for the petitioner's claim is at odds with the plain language of the statute. Under the guise of refusing to recognize new causes of action that Congress "simply forgot to incorporate expressly" (Pet. App. at 4a (quoting *Russell*, 473 U.S. at 146)), the Fourth Circuit has written out of ERISA a cause of action that Congress did include expressly. Section 502(a)(2) creates a cause of action for "*a* participant . . . for appropriate relief under section 1109 of this title. . . ." 29 U.S.C. §1132(a)(2) (emphasis added). Under ERISA Section 409(a), 29 U.S.C. § 1109(a), "[a]ny person who is a fiduciary with respect to a plan who breaches *any of the responsibilities, obligations, or duties* imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan *any losses* to the plan resulting from each such breach. . . ." (emphasis added). Section 502(a)(2) thus expressly authorizes a single participant in any pension plan, including an individual account plan, to sue a plan fiduciary for any loss to the plan.

The Fourth Circuit acknowledged that "the recovery plaintiff seeks could be seen as accruing to the plan" because it would be paid to the plan. (Pet. App. at 6a.) It nonetheless held, however, contrary to the plain language of the statute, that the petitioner had not stated a cause of action under Section 502(a)(2) because the plan would receive the payment only "in the narrow sense that [the recovery] would be paid into plaintiff's personal plan account. . . ." (Pet. App. at 6a.) Whether in a narrow or broad sense, however, the payment

would be made to the plan, which is all the statute requires, regardless of whether the recovery is allocable to one, several, many, or all of the accounts in the plan.

In finding Section 502(a)(2) not satisfied, the Fourth Circuit erroneously focused on the "personal" benefit that will result from any recovery in this case and effectively read the plan out of existence, as if the petitioner upon prevailing would receive a cash payment in his personal bank account. In this, the court of appeals was mistaken. There is a fundamental difference between receiving a cash payment, as sought by the plaintiff in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), which can be used at the recipient's discretion, and having the same amount of money paid to a retirement plan, albeit on the participant's behalf as in this case, where the account is restricted by law and not distributable until a stated event. Indeed, calling such an account "personal" may be a misnomer. The required individual accounts are bookkeeping entries only; they are not actual individual bank accounts or individual retirement arrangements owned by the participants. S. Sacher, *Employee Benefits Law* 175 (2d ed. BNA 2000). In fact, even though a recovery might be allocable to an individual account in a defined contribution pension plan, there is no guarantee that the participant will actually receive that amount since the ultimate value of the account depends on its investment performance throughout the period of eligibility until actual withdrawal.

Entitlement to and distribution of pension benefits from individual account retirement plans is strictly regulated. Depending on the design of the plan, employer contributions may, but need not be, distributable while an employee is still employed after the passage of a certain number of years, while

salary deferral contributions to a 401(k) plan are generally not distributable until separation from employment or attainment of age 59-1/2, except in the case of a narrowly defined "hardship," as set out in Treasury Regulations. 26 U.S.C. §401(k)(2)(B)(i)(IV); 26 C.F.R. §1.401(k)-1(d). Thus, a recovery to a plan paid by a breaching fiduciary, even if allocated to one or more individual accounts, cannot be accessed or used at will by the participant. The participant cannot use the recovery to pay for clothing, food, rent, commuting, gifts, or other day-to-day living expenses not rising to the level of a "hardship" as defined in the Regulation. The court's implication that payment of the recovery to the plan is tantamount to payment to the individual because it is allocated to a participant's individual account and thus is the same as a "personal" recovery simply flies in the face of reality.

The truth is that the restrictions on accessing assets of individual accounts in defined contribution plans are intended to serve ERISA's central purpose of preserving money for retirement and ensuring that participants do not squander their retirement assets during their working years. That purpose should not be thwarted by wrongly denying individual account plan participants protection under Section 502(a)(2) merely because any recovery to such a plan will be allocated among individual accounts.

Not only did the Fourth Circuit conflate a payment to the plan with a payment directly to a plan participant, it misconstrued the nature of the plan itself. The court reasoned that a participant who "desires recovery to be paid into his plan account" does not seek relief to the plan as required by Section 502(a)(2). (Pet. App. at 6a.) Similarly, in its denial of the petition for rehearing and a hearing *en banc*, the Fourth

Circuit distinguished other cases properly brought under Section 502(a)(2) where "an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants," stating that in such a case, "the remedy will undoubtedly benefit the plaintiff and other participants in the plan, but it does not solely benefit the individual participants." (Pet. App. at 6a (citations and internal quotations omitted).)

But an individual account plan is nothing more and nothing less than a pooled trust held solely for the benefit of the participants. *See, e.g., Hughes Aircraft*, 525 U.S. at 439-40. Any recovery to any individual account plan in a Section 502(a)(2) fiduciary breach case will necessarily be paid into the participants' accounts, because there is nowhere else to pay it. *See* Dan M. McGill, et al., *Fundamentals of Private Pensions* 247-48 (7th ed. 1996).

The Fourth Circuit's attempt to distinguish this case from one brought by a "subset" of participants (Pet. App. at 26a) fails because *one* participant is a "subset." In any event, to distinguish between a case with one or several plaintiff participants creates an arbitrary and unworkable guide to courts evaluating Section 502(a)(2) claims. There is simply no principled way, and no statutory basis, to set a numerosity requirement for Section 502(a)(2) actions. If one is too few, are 10, 100, 500, or 1,000 enough? How is a court to decide? Indeed, if Congress wanted to establish a numerical threshold for participants' standing, it would have done so.

In its denial of the petition for rehearing, the court suggested that Section 502(a)(2) is available only for certain types of fiduciary breaches and, thus, unjustifiably added a restriction to Section 502(a)(2) that is not found in the text

of the statute. Specifically, the court criticized the Secretary of Labor for seeking to force fiduciaries to "face personal liability for every wrong alleged by individual beneficiaries, even in the absence of personal profit or misuse of plan assets. . . ." (Pet. App. at 28a.) This narrow interpretation of ERISA's fiduciary duties truncates the broad reach of the statute, which imposes liability on fiduciaries for breaching "*any* of [their] responsibilities, obligations, or duties" for "*any* losses to the plan resulting from each such breach. . . ." 29 U.S.C. §1109 (emphasis added). There is no basis for concluding that actionable fiduciary breaches are limited to breaches involving personal profit or misuse of plan assets. Holding so would vastly limit the remedies available to plan participants who are harmed by fiduciary breaches. Again, if Congress had intended such a limit, it would have written one in the statute.

The claims in this case allege a breach of the duty that goes to the very heart of the fiduciary's responsibility to beneficiaries. Under both traditional trust law and ERISA, the fiduciary owes a duty of loyalty to the beneficiaries. *See* ERISA §404(a)(1), 29 U.S.C. §1104(a)(1); Restatement (Third) of Trusts §78(1) (Duty Of Loyalty); *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (ERISA requires that fiduciaries have " 'an eye single' toward beneficiaries' interests" (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982))). A trustee who has failed to carry out the express wishes of a beneficiary, as is the allegation in this case, has violated this core fiduciary responsibility. There is no support in the text of the statute for denying the petitioner a remedy.

II. The Fourth Circuit's Decision Conflicts With the Legislative History

ERISA's legislative history confirms that Congress contemplated that an individual account plan participant might sue for breach of a fiduciary duty even though only the individual would "benefit" from the litigation. For example, in discussing the Section 404(c)[3] defense available against alleged fiduciary breach claims when participants direct the investments of their accounts in 401(k) plans, the Conference Report states that a fiduciary would be liable to a plan for investing a single participant's assets in an investment prohibited by the plan. *See* H.R. Conf. Rep. No. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5085-86. The Report explains that:

> [A] special rule is provided for individual account plans where the participant is permitted to, and in fact does, exercise independent control over the assets in his individual account. In this case, *the individual* is not to be regarded as a fiduciary and other persons who are fiduciaries with respect to the plan are not to be liable for any loss that results from the exercise and control by the participant or beneficiary. Therefore, if *the participant* instructs the plan trustee to invest the full balance of *his account* in, *e.g.*, a single stock, the trustee

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3. ERISA Section 404(c), 29 U.S.C. §1104, provides that a participant who exercises control over his or her account in an individual account plan that meets certain requirements set forth in the applicable regulations shall not be treated as a fiduciary with respect to such account, and that no person who is otherwise a fiduciary of the plan shall be liable under ERISA for any loss resulting from the participant's exercise of such control.

> is not to be liable for any loss because of a failure to diversify or because the investment does not meet the prudent man standards. However, the investment must not contradict the terms of the plan, and *if the plan on its face prohibits such investments, the trustee could not follow the instructions and avoid liability.*

Id. at 5085-86 (emphasis added). This last sentence demonstrates that Congress contemplated that a trustee *could* be liable to a single participant in an individual account plan if he or she breaches his or her fiduciary duties.

III. *Russell* Provides No Support for the Fourth Circuit's Decision

Nothing in this Court's decision in *Russell* prohibits a single participant from suing a fiduciary for recovery to the plan. In *Russell*, the plaintiff sued plan fiduciaries to recover consequential and punitive damages, to be paid to herself, for an aggravated psychological condition and back ailment allegedly suffered as a result of the temporary interruption in her disability benefits. *Russell*, 473 U.S. at 136. In holding that the plaintiff lacked standing under Section 502(a)(2), the Court ruled that a Section 502(a)(2) recovery must be paid to the plan and not directly to the participant. In holding that ERISA Section 409 did not contemplate the individualized relief sought by Mrs. Russell, the Court cited Congress' intent that ERISA protect "the entire plan" rather than "the rights of an individual beneficiary." *Id.* at 142.

The Fourth Circuit took the relevant phrases of *Russell* out of context. *Russell's* discussion of the requirement that a fiduciary breach claim "protect the entire plan," or that it be brought on behalf of "the plan as a whole" was intended to distinguish appropriate 502(a)(2) claims from those where the recovery would be paid directly to the plaintiff. The issue here, failure to invest plan assets according to the participant's directions, is precisely the type of claim *Russell* permits under Section 502(a)(2).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: August 6, 2007

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IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC. and
DEWOLFF, BOBERG & ASSOCIATES, INC.
EMPLOYEES' SAVINGS PLAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF INTEREST[1]

The American Council of Life Insurers ("ACLI") is the nation's largest life insurance trade association, representing the interests of 373 legal reserve life insurers operating in the United States. ACLI member companies are the leading providers of financial and retirement security products covering individual and group markets. They provide life, disability income and long-term care insurance, annuities, pension products for 401(k), 403(b) and 457 plans, individual retirement accounts and reinsurance. In the United States, ACLI members account for 93% of the life insurance industry's total assets, 91% of life insurance premiums, and 95% of annuity considerations. Life insurance policies issued by ACLI members include employer-sponsored group disability insurance policies and group life policies. Annuities issued include group annuities issued to employer-sponsored retirement plans. The vast majority of products sold by ACLI members in the group employee benefits market are subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

Resolution of the questions presented, involving which remedies Congress did and did not authorize in crafting ERISA, could have legal and practical ramifications extending far beyond the parties to this case. Given the

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1. In compliance with Rule 37.6, *amicus curiae* states that no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to preparation or submission of this brief, and no attorney for any party authored this brief in whole or in part. In compliance with Rule 37.3(a), *amicus curiae* states that petitioner and respondents have separately filed with the Clerk their consent to filing of *amicus* briefs.

extensive and vital involvement of ACLI's members in the employee benefits field regulated by ERISA, ACLI is well positioned to address the practical impact on employer-sponsored benefit plans if currently available ERISA remedies are expanded, as petitioner and his supporting *amici* urge, to expose ERISA fiduciaries to claims for monetary damages by plan participants based on losses allegedly suffered by individuals with respect to their benefit plan accounts. Allowing erosion of the statutory limits to ERISA remedies may have significant adverse consequences for ACLI members. These include increased costs for employer-sponsored plans and a concomitant decrease in the number of employers able and willing to sponsor and administer them – thereby decreasing the number of employees participating in those plans.

SUMMARY OF ARGUMENT

Petitioner James LaRue seeks compensatory damages for lost profits he claims his individual 401(k) account would have gained had a putative fiduciary for the plan carried out his investment directions. Because ERISA has a single provision governing all available remedies under the statute, the consequential damages LaRue seeks threaten to expand ERISA's remedies to a host of contexts alien to LaRue's single 401(k) account. Neither of his two avenues for claiming this expanded relief are supported by the language Congress used to describe the limited remedies available under ERISA or this Court's cases construing those remedies.

First, LaRue's belief that ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), allows damage claims based on injuries to his individual 401(k) account is contradicted by this Court's

cases holding that any relief under that section must redress harm to the plan as a whole. LaRue's theory ignores the fact that Congress provided a single remedy provision for all ERISA fiduciaries with language that did not create an exception for 401(k) plans with individual accounts. Moreover, even if the Court were to grant LaRue's proposed remedy, his basis for seeking that relief – the existence of individual accounts – is not a feature of virtually any other type of plan and that remedy should not be extended to plans that do not hold assets in individual accounts.

Second, LaRue invokes the equitable remedies available under ERISA § 502(a)(3) as a basis for seeking his lost profits. The type of consequential damages he seeks is monetary compensation, the classic legal remedy. His surcharge theory is itself a remedy not "typically" available in equity as a whole. Surcharge was instead a form of relief available only in the subset of equity cases addressing the abuse of trust assets.

LaRue's position overlooks the consequences his expansion of remedies under ERISA § 502(a)(3) would cause in other contexts in which fiduciaries provide services to ERISA plans. Congress provided only one remedy provision under ERISA and any monetary remedy crafted for LaRue would arguably extend to other plaintiffs in contexts far removed from his 401(k) plan. In many contexts, an insurer might be deemed to be a fiduciary when it determines whether a participant has a valid claim for benefits. LaRue's theory threatens virtually limitless liability for consequential damages when those insurers apply plan language to deny benefits under a plan. Similarly, despite Congress's stated purpose to limit ERISA's remedies, this expansion of consequential damages proposed by LaRue would have the

natural consequence of discouraging employers from offering plans, thereby further eroding the availability and scope of health, life and other welfare plans on which employee participants have come to rely.

ARGUMENT

The purpose of LaRue's lawsuit is to recover money he claims he might have had if the fiduciaries for his 401(k) pension plan followed his investment directions. He asks the Court to allow him to pursue a claim for "consequential" or "make whole" damages that were the result of an alleged breach of duty he describes in his complaint. *E.g.*, Pet. Br. 11.

To convince the Court that this form of relief should be available under ERISA §§ 502(a)(2) and (3), LaRue wraps his arguments wholly within the confines of the specific 401(k) plan at issue in this case and ignores the effects his arguments could have outside of that limited context. If the Court authorizes consequential damages for an alleged omission in the management of LaRue's individual 401(k) account, it threatens to create a broad judicial expansion of ERISA's remedial scheme respecting all forms of fiduciary activity under all forms of ERISA-regulated pension and non-pension welfare arrangements. This result would be inconsistent with the "carefully integrated" set of enforcement provisions found in 29 U.S.C. § 1132, *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), and should be rejected.

I. LaRue's "Bookkeeping" Theory Has No Application Outside Of His 401(k) Plan And, If Adopted, Should Be Explicitly Rejected For Claims Outside That Context.

This Court has determined that any remedy under ERISA § 502(a)(2) – and, in turn, ERISA § 409 – must "inure[] to the benefit of the plan as a whole." *Russell*, 473 U.S. at 139. LaRue believes the Court should set aside this authority for his claims because individual accounts in 401(k) plans are a mere "bookkeeping" fiction and the interests of the individual and the plan are indistinguishable in those plans. *See* Pet. Br. 19.[2]

Far from a mere "bookkeeping" entry, the establishment of individual accounts is the critical feature of many 401(k) plans. Individual account arrangements such as 401(k), thrift, and savings plans are distinctly regulated by ERISA, and precisely because of their separate accounting feature. *E.g.*, 29 U.S.C. § 1107(d)(3) (defining "eligible individual account plan"); 29 U.S.C. § 1104(a)(2) (excusing eligible individual account plans from certain prudence and diversification requirements in connection with qualifying employer securities). In contrast, there are no separate accounts for most traditional pension and welfare benefit plans. The fact that Congress provided a single remedial provision for all plans with no exception for 401(k) plans shows that LaRue's proposed expansion of the remedies available under ERISA § 502(a)(2) – and the related effective rejection of the "plan as a whole" limitation – should be denied.

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2. *See also* Br. for the United States as *Amicus Curiae* 10-11 (relying on nature of defined contribution plans to expand remedies under ERISA § 502(a)(2)); Br. of *Amicus Curiae* AARP 10; Br. of *Amicus Curiae* Air Line Pilots Ass'n, Int'l 8.

Even if the Court were inclined to set aside the well-established law holding that claims under ERISA § 409 must be for relief to the "plan as a whole" and create an exception for 401(k) plans, any such holding should not extend outside the context of 401(k) plans with separate accounts. LaRue's basis for asking the Court to unwind the restrictions Congress placed on ERISA § 502(a)(2) is his focus on the nature of his own 401(k) plan. There is no basis either in LaRue's arguments or Congress's policy to expand his damages theory to the various other species of ERISA plans. To do so would have widespread and unintended consequences for fiduciaries in those plans and the employees who rely on and need the benefits they provide.[3] Even if the Court were to find LaRue's arguments persuasive, it should cabin any holding to the context of 401(k) plans with "bookkeeping" accounts and make clear that LaRue's theory cannot erode the specific limitation on remedies Congress provided for every other species of ERISA plan.

II. LaRue's Claim For Consequential Damages Is Not What Congress Meant By "Equitable" Relief And Allowing That Relief Would Cause A Host Of Consequences Contradicting The Limitation On Remedies Under ERISA § 502(a)(3).

Congress expressly limited the remedies available under ERISA § 502(a)(3) to those that are "equitable." *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993). Congress intended this language to embody a limiting principle in the relief available under that provision. *Id.* The Court has

3. For instance, as described in Section II.B *infra*, expansion of liability under ERISA has the effect of discouraging employers to create employee welfare plans, a consequence directly contradicting Congress's intent.

therefore instructed that "equitable relief" under ERISA § 502(a)(3) refers "to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256 (emphasis in original).

LaRue now asks the Court to abandon this limiting principle and re-write ERISA to allow claims for the type of consequential damages that he allegedly suffered in relation to his plan fiduciary's purported failure to carry out his investment instructions. This request for "make whole" damages was not typically available in equity and is not the type of remedy Congress provided under ERISA § 502(a)(3).

Moreover, because ERISA contains a single remedy provision, allowing consequential damages under ERISA could affect the broader species of benefits provided for employees in the multitude of plans governed by ERISA. Any expansion of these remedies threatens to creep into claims asserted under these different types of benefit plans. A number of direct consequences flow from LaRue's proposed broadening of the remedies available under 502(a)(3), including the potential availability of claims for consequential damages as a remedy for a fiduciary's denial of benefits under welfare benefit plans and a reduction in the availability of employer-sponsored plans in direct contravention of Congress's intent. Because these consequences would violate the language of ERISA, the Court's caselaw and Congress's goals for ERISA, the Court should reject LaRue's proposed expansion of the remedies available under ERISA § 502(a)(3).

A. LaRue's claim for consequential "lost profit" damages is in no sense the type of relief that was "typically" available in equity.

LaRue invokes ERISA § 502(a)(3) as a mechanism for obtaining "make whole" or "consequential" relief. He therefore characterizes his relief as an award that would make his 401(k) account the same as it would have been "but for the breach of fiduciary duty." Pet. Br. 11. LaRue asks for these consequential damages through what he deems an equitable "surcharge," while some of his supporting *amici* bluntly ask the Court to award damages without any rhetoric sounding in equity.

However, the Court has unequivocally held that remedies under ERISA § 502(a)(3) are limited to those that were "*typically*" available in equity. *Mertens*, 508 U.S. at 256 (emphasis in original). LaRue's hyper-technical "surcharge" theory is a rhetorical device with no support in the Court's reading of ERISA § 502(a)(3). The Court has always recognized that blowing the dust off of the equity treatises would almost always allow plaintiffs to find an equitable patina with which to gloss their claims for legal damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). The question is not whether the participant's claim bears some resemblance to an equitable remedy found somewhere in the annals of equity jurisprudence, but whether the remedy is what Congress would understand to be among those remedies "typically" available in equity. Monetary compensation for consequential injuries (here, hypothetical lost profits) has long been understood as a classic legal remedy. *E.g.*, *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). Common sense pierces through LaRue's invocations to equity and shows that what he seeks is a legal remedy.

Nor is "surcharge" a remedy that was "typically" available in equity. *Mertens*, 508 U.S. at 256. On its face, the surcharge theory only applies in the context of *trust cases* and not all claims in equity. LaRue's Brief to this Court contains a section heading that makes this point crystal clear: "Surcharge is not properly viewed as a 'legal remedy' that was awarded by equity courts *in trust cases*." Pet. Br. 35 (emphasis added). Because this surcharge remedy was itself limited to one subspecies of trust cases, it does not apply broadly to all claims in equity and was not "typically" available in equity cases.

Many ERISA plans do not even incorporate the trust concept on which LaRue's theory rests. Although ERISA generally requires that all plans have one or more trustees, *see* 29 U.S.C. § 1103(a), it also explicitly exempts insurance policies and the assets of an insurance company from that trustee requirement. *See* 29 U.S.C. § 1103(b)(1) & (2) (exempting from the trust requirement "any assets of a plan which consist of insurance contracts or policies issued by an insurance company" and "any assets of such an insurance company or any assets of a plan which are held by such an insurance company"); *see generally Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1561-62 (11th Cir. 1990) (an "insurance policy . . . is not an asset held in trust for the beneficiaries of the plan because the trust requirements of section 1103(a) do not apply"; an "insurance company pays out to beneficiaries from its own assets rather than the assets of a trust").

ERISA therefore expressly provides that in some circumstances insurers might not hold assets in trust even when they otherwise serve as a fiduciary for a plan and exercise discretion under the plan. *See* 29 U.S.C. § 1103(b)(1)

& (2). For welfare benefit arrangements structured in this manner, the benefits are funded instead through the issuance of a policy for life, disability, health or other form of ERISA-regulated welfare benefit. The benefits provided under such plans come from the private funds of the insurance company. Before being paid to the participants, these sums are held in the insurer's state-regulated general accounts. LaRue's surcharge theory derives solely from the trust context, which bears no relation whatsoever to the many non-trusted ERISA plans provided by life insurers. *See* Pet. Br. 34 (saying that surcharge provides remedy against "a trustee, for breach of trust") (internal quotation marks and citation omitted).[4]

4. LaRue's surcharge theory seeks to impose this trust law remedy on all fiduciaries without accounting for non-trusted plans. The Court's cases already make clear that trust law remedies should not be expanded into ERISA *carte blanche* to defendants who are not serving as trustees in relation to the assets at issue. *See Varity Corp. v. Howe*, 516 U.S. 491, 496-97 (1996) (ERISA's "fiduciary duties draw much of their content from the common law of trusts," but "that trust law does not tell the entire story"). Indeed, the distinction between funds held in trust and those not held in trust was the critical fact distinguishing the availability of a remedy in the Court's two most recent cases under ERISA § 502(a)(3), *Great-West* and *Sereboff v. Mid Atlantic Medical Servs., Inc.*,126 S.Ct. 1869 (2006). When serving as fiduciaries of non-trusted plans, life insurers by definition exercise the discretion given to them by those plans and by ERISA. They are not, however, automatically deemed to be (and do not act as) trustees of plan assets. Trust law remedies simply have no application to these insurance company funded arrangements. *See Wachtel v. Health Net, Inc.*, 482 F.3d 225, 227 (3d Cir. 2007) ("When a plan beneficiary submits a claim, the [insurer] will process the claim and, if appropriate, pay the beneficiary from the [insurer]'s own funds"). In other words, LaRue's theory of damages wrongfully asks this Court to make available a trust law remedy under ERISA's enforcement provision, which applies to all ERISA fiduciaries regardless of whether they are trustees or are simply fiduciaries exercising discretion over non-trusted assets.

Several *amici* suggest that not allowing this trust remedy in the instant case would leave those injured by a fiduciary's breach without any remedy in derogation of ERISA's remedial purpose. *E.g.*, Br. for the United States as *Amicus Curiae* 9-10.[5] Of course, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 261-621 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-647 (1990), and citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 54, 56 (1987)).

LaRue in fact had a number of remedies available under ERISA, but chose to forgo them in favor of his broader lost profits theory. Notably, ERISA § 502(a)(1)(B) allows a participant in LaRue's position to seek declaratory relief in order to enforce or clarify his rights under the plan. LaRue could well have sought a declaration that his interest in the plan should reflect the investment directions he claims he ordered his fiduciary to make.

Indeed, even if ERISA § 502(a)(1)(B) did not provide relief, ERISA § 502(a)(3) would itself have provided LaRue

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5. Indeed, the worst of the horribles suggested by *amici* – the naked theft of plan assets – is itself criminal. *See* 18 U.S.C. § 664 (making it a federal offense to convert ERISA plan assets). A civil remedy against the perpetration of such thefts might be available under the Racketeer Influenced and Corrupt Organizations Act, ("RICO"). *See* 18 U.S.C. § 1961 (listing RICO predicate acts and including violation of 18 U.S.C. 664); 18 U.S.C. § 1964 (creating right to civil enforcement under RICO).

the remedy of an injunction for the purported breach of fiduciary duty that occurred in this case. ERISA § 502(a)(3) allows a participant to seek an injunction to require a fiduciary to carry out his duties, including acting on an investment direction under a 401(k) plan. *See* 29 U.S.C. § 1132(a)(3)(A) (allowing suit "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan"). LaRue did not invoke this remedy, but instead waited to exercise his ERISA rights until he incurred the consequential damages that he now seeks to recover.[6]

These examples are only some of the available remedies under ERISA that already adequately protect his interests under the limited facts of this case. Obviously, a galaxy of other examples exist in the broader context of defined contribution plans and a universe of other remedies exist when the view is expanded to include the management of all ERISA pension and welfare plans.

Out of this universe of remedies available to LaRue, Congress barred LaRue from pursuing only the lost profits he now believes maximizes the potential financial recovery in this lawsuit. The maximum monetary recovery may not

6. Allowing damages in light of LaRue's failure to invoke the available injunctive relief puts LaRue squarely in the proverbial catbird seat. He would benefit directly if his investment direction proved unwise, and the fiduciary's failure to carry out the command protected him from an adverse market downturn. If the fiduciary's failure did result in injury because his investment decision proved wise, he would then have the option to sue to recover his damages. He could not lose in either position. Granting LaRue relief in this case would encourage other plan participants to do the same. Denying the relief LaRue seeks would ensure that a plan participant who claims his investment directions were not followed will take prompt action to compel that his directions are followed.

always be the optimal policy choice, and the balance of available remedies and the consideration of the societal costs posed by those remedies is a uniquely legislative function. Congress engaged in this balance in 1974 when it passed ERISA after a "decade of congressional study of the Nation's private employee benefit system." *Mertens*, 508 U.S. at 251. Congress has not seen fit to grant plaintiffs the right to consequential damages in the intervening decades or in the years since *Mertens* first construed ERISA § 502(a)(3). There is no basis to infer such a right at this late date, and no basis retroactively to expose ERISA fiduciaries to claims for consequential damages. *Mertens*, 473 U.S. at 146-147 (the Court is "unwilling[] to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly'") (quoting *Russell*, 473 U.S. at 146-47).

B. LaRue's proposed expansion of 502(a)(3) has a host of negative consequences that Congress did not intend in enacting ERISA.

While LaRue's argument arises in the context of his 401(k) plans (which are themselves a subspecies of ERISA defined contribution plans), his proposed remedy threatens a broadening of all remedies available under ERISA § 502(a)(3), thereby contravening the protection Congress intended for ERISA fiduciaries and the balance it struck in enacting ERISA § 502(a)(3). While a host of effects could be created by this expansion of those remedies, at a minimum LaRue's theory: (1) threatens to allow consequential damages for the denial of benefits in welfare plans; and (2) discourages the creation of plans because of the virtually limitless exposure of consequential damages claims.

First, LaRue's theory threatens to expand fiduciary liability into the context of benefits claims administration. The life insurers who are members of ACLI provide life, disability income and health insurance as part of a variety of employer-sponsored plans. They are therefore called upon to carry out a number of functions that may be deemed to involve fiduciary duties under ERISA, including determining whether individual participants are entitled to benefits under those ERISA welfare plans. *Mertens*, 508 U.S. at 251-52 (identifying "the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest" as fiduciary functions under ERISA) (quoting *Russell*, 473 U.S. at 142-143); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004).

When viewed outside the limited context of LaRue's 401(k) plan, LaRue's consequential damages theory threatens to revamp fiduciary relationships in a way that is inconsistent with the limited remedies Congress intended under ERISA § 502(a)(3). Nowhere is the tension created by LaRue's consequential damages theory more acute then when viewed in the context of benefits decisions that insurers are asked to make on a daily basis. In many contexts, an insurer might be deemed to be a fiduciary when it determines whether a participant has a valid claim for benefits. *See Davila*, 542 U.S. at 220 ("the ultimate decisionmaker in a plan regarding an award of benefits must be a fiduciary and must be acting as a fiduciary when determining a participant's or beneficiary's claim"); *see also* 29 U.S.C. § 1104(a)(1).

ERISA explicitly provides a right to sue plans for the recovery of benefits owed to participants. *See* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This provision

authorizes a civil action "by a participant or beneficiary" to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of plan, or to clarify his rights to future benefits under the terms of the plan." As this Court has explained, "[t]his provision is relatively straightforward. . . . If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits." *Davila*, 542 U.S at 210.

This remedy is itself limited. By its terms, the only monetary remedy available under section 502(a)(1)(B) is the benefits due "under the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989). Because ERISA § 502(a)(1)(B) claims are limited to the actual benefits owed by the plan and not all consequential injuries, an enterprising plaintiff wanting to expand its recovery would naturally attempt to rely on LaRue's consequential damages theory to go beyond the remedies Congress provided under ERISA § 502(a)(1)(B).

The Court has previously warned against conflating claims for benefits with claims for breach of fiduciary duty. *See Varity Corp. v. Howe*, 516 U.S. 491, 512 (1996); *see also Davila*, 542 U.S. at 219 ("a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan"). Instead, the Court has explained that claims based on the denial of benefits should be asserted under ERISA § 502(a)(1)(B). The *Varity* Court ruled that ERISA § 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims," while ERISA § 502(a)(3), in contrast, is a "'catchall'" provision that "act[s] as a safety net, offering appropriate

equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy."[7]

Because the denial of benefits can arguably be a breach of fiduciary duty in some circumstances, LaRue's consequential damage theory threatens to reopen the availability of damages for the denial of benefits and serve as an end-run to the limitations imposed by ERISA § 502(a)(1)(B). Thus, LaRue's expansion of remedies under 502(a)(3) could expose life insurers (and all persons or entities making claims decisions) to an entirely new species of claims for damages despite the Court's earlier rulings. Although LaRue ostensibly desires to limit his theory only to 401(k) cases, Congress gave ERISA a single remedy provision and whatever relief LaRue might be afforded could be deemed available to all ERISA participants regardless of the nature of the plan. *See* 29 U.S.C. § 1132. Because it is clear that participants in welfare benefit plans do not have the right to recover the type of consequential damages LaRue seeks in this case, the Court should reject LaRue's backdoor attempt to change the remedies available in all ERISA plans based on his status as a participant in a 401(k) plan.

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7. Courts of Appeal addressing the issue have universally come to the same conclusion. *E.g.*, *LaRocca v. Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) (collecting authority) ("federal courts have uniformly concluded that, if a plaintiff can pursue benefits under the plan pursuant to Section 502(a)(1), there is an adequate remedy under the plan which bars a further remedy under Section (a)(3)"); *see also Tolson v. Avondale Indus.*, 141 F.3d 604, 610 (5th Cir. 1998); *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 933 (8th Cir. 2003); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997).

Second, LaRue's proposed damages would inevitably discourage both employers and third parties from providing fiduciary services to ERISA plans. Congress enacted ERISA in order to encourage the creation of benefit plans for employees. *Pilot Life*, 481 U.S. at 54 (ERISA "represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"); *see also Mertens*, 508 U.S. at 262-63. LaRue's consequential damages theory would have the opposite effect. Faced with expanded (and unanticipated) liability, both employers and third parties would inevitably withdraw from serving as fiduciaries to employee welfare plans. Third-party fiduciaries such as life insurers would necessarily charge more for their services, which in turn would make their services less attractive to employers. Employers would either absorb these costs themselves or not offer plans to their employees at all. These additional costs would further erode the availability of health and life insurance benefits. Whether this effect is acceptable as a policy matter is a uniquely legislative decision that should be left to Congress. *See id.* ("Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. . . . We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.").[8]

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8. Indeed, premiums for fiduciary insurance continue to rise even without the expanded liability sought by LaRue. *E.g.*, Towers Perrin, *Navigating Today's Fiduciary Concerns, Executive Summary of 2003 Fiduciary Liability Survey Report* at 10, *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2004/200407/Navigating_Concerns.pdf (last viewed Sept. 11, 2007).

Moreover, those who presently serve as fiduciaries accepted their duties (and have insured themselves) based on the present scope of fiduciary liability available under ERISA as set out in the Court's ERISA caselaw. None of the Court's previous cases has allowed an ERISA § 502(a)(3) claim for compensatory or consequential damages against an ERISA fiduciary, much less life insurers serving as limited fiduciaries for all forms of employee welfare benefit plans. These fiduciaries accepted their responsibilities under that existing law. If ERISA remedies are expanded to include consequential damages, fiduciaries will have difficulty obtaining insurance coverage for the retroactive exposure that would spring to life, as they obtained coverage under the settled existing law that does not allow for consequential damages under ERISA. Plaintiffs asserting claims based on events that predate any expansion of remedies would no doubt claim entitlement to that extension of ERISA § 502(a)(3)'s remedies even though fiduciaries had no reason to expect that they would be exposed to those consequential damages. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990) ("Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases"); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("Judicial decisions operate retroactively because we generally regard them as an expression of pre-existing law").

Because of these concerns, existing plans would face the prospect of losing the professional services provided by life insurers and others who presently act as fiduciaries due to a significant and wholly unanticipated expansion of liability beyond the terms of the statute and current caselaw.

CONCLUSION

By wrapping his claim for relief within the narrow confines of 401(k) plans, LaRue's argument that the Court should expand the type of individual relief provided by ERISA ignores the broader effects his consequential damages theory could impose on welfare benefit plans and other benefit arrangements. Placing that remedy in context, it might create rights for recovery against ACLI's members that Congress did not intend and that this Court has previously foreclosed. The Court should reject LaRue's proposed relief and affirm the decision of the Fourth Circuit.

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JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; and DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

This *amici curiae* brief is submitted on behalf of the Chamber of Commerce of the United States of America (the "Chamber") and the Financial Services Roundtable (collectively the "*Amici*").[1]

The Chamber is the world's largest business federation. The Chamber has an underlying membership of more than three million businesses of every size, in every industry sector and in every geographical region of the country. The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $65.8 trillion in managed assets, $1 trillion in revenue, and 2.4 million jobs. An important function of the Chamber and the Financial Services Roundtable is to represent the interests of their members by filing *amicus* briefs in cases involving issues of concern to the American business community. This is one such case.

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[1] In accordance with Supreme Court Rules, the *Amici* represent that no counsel for any party to this action authored this brief or made a monetary contribution to its preparation or submission. SUP. CT. R. 37.6. In addition, the *Amici* represent that the brief is filed with the consent of the parties. *See* Letter of P. Stris dated 7/27/07 and Letter of T. Gies dated 8/29/07, both of which have been filed with the Court.

Most of the *Amici*'s business members have established and continue to maintain employee benefit plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* These members have a vital interest in the outcome of this case. If the Court of Appeals is reversed, this Court's decision would expand ERISA remedies, and thus ERISA claims, beyond the intent of the Congress as evidenced by the language of the statute. Such an expansion of ERISA remedies will increase the cost of ERISA plan administration to *Amici* members, including the cost associated with appointing and monitoring ERISA fiduciaries, and likely will force *Amici* members to cut back benefits, or decline to provide benefit improvements or benefit enhancements. Under the ERISA scheme, private sector employers can reduce non-vested ERISA benefits or choose not to offer benefit enhancements, because the statute promotes the *voluntary* establishment of benefit plans. Judicial expansion of ERISA remedies by reversing the Court of Appeals therefore would contravene the Congressional scheme in ERISA to maximize the establishment and maintenance of ERISA plans by limiting remedies.

The issues before the Court are (1) whether ERISA Section 409(a), 29 U.S.C. § 1109(a), permits an *individual*, as opposed to a *plan*, remedy, even though the statutory language permits only a plan remedy; and, (2) whether ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), permits *legal*, as opposed to *equitable*, relief, even though the statutory language does not

use the word "legal" and this Court already has definitively ruled that Section 502(a)(3) permits only equitable relief. The *Amici* have a substantial interest in the issues presented to the Court for review, and submit this brief in support of the position of Respondents on these issues.

SUMMARY OF ARGUMENT

The first issue presented for review comes to the Court in a unique procedural posture that requires the Court to accept as true the well-pled allegations in the Petitioner's Complaint. The first issue asks whether ERISA Section 502(a)(2) and Section 409(a), 29 U.S.C. §§ 1132(a)(2), 1109(a),[2] authorize a participant in a defined contribution pension plan, on behalf of himself and no other participants, to recover "lost" gains attributable to his *individual* plan account. The Complaint does not allege that Petitioner seeks relief for the *plan* and does not purport to arise under ERISA Section 502(a)(2); rather, it purports to arise only under Section 502(a)(3), 29 U.S.C. § 1132(a)(3). The threshold reason that the Court should affirm the judgment of the Court of Appeals is that the Complaint does not even place at issue ERISA Section 502(a)(2).

[2] Section 502(a)(2) expressly incorporates Section 409(a) of ERISA. 29 U.S.C. §§ 1109(a), 1132(a)(2) (2007). Section 502(a)(2) and Section 409 are used interchangeably in this brief.

Additionally, even under any attenuated reading of the Complaint, Petitioner does not seek monetary relief for his defined contribution pension *plan* – an undisputed precondition to stating a valid claim under Section 502(a)(2). The Complaint instead seeks "make whole" relief of $150,000 that would pass through the plan without any administrative processing or consideration, directly into Petitioner's individual account.[3] Brief in Opp'n, App. 4a. This Court stated in *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987), that a single benefit payment "hardly constitutes the operation of a benefit plan," because the employer does "little more than write a check." *Id.* at 12. By analogy, a single payment of $150,000 directly to an individual account would not implicate a *plan*, and thus could not constitute plan relief within the meaning of Sections 502(a)(2) and 409(a).

This Court should not countenance Petitioner's attempt to recast his Section 502(a)(3) claim in the Complaint into an unstated Section 502(a)(2) claim. He thus seeks to expand the scope of Sections 502(a)(2) and 409(a) beyond their language – an undertaking that this Court should reject.

Petitioner's attempt to rewrite Sections 502(a)(2) and 409(a) would have adverse consequences to the millions of private sector Americans who receive

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[3] In fact, Petitioner no longer has an individual account with the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan. Mot. To Dismiss The *Writ* 5-6. The $150,000 would pass directly to Petitioner's personal bank account.

employee benefits from ERISA plans. The statute is carefully crafted to encourage employers to establish ERISA plans on a voluntary basis. Its remedies thus are limited in a way that Congress thought would accomplish this goal. If those remedies are expanded beyond what the statute allows, the balance set by Congress would be tipped, and fewer ERISA plans would be established or the level of benefits provided under ERISA plans would be lessened. This Court should stay true to ERISA in order to stay true to the salutary Congressional goals in ERISA.

The second issue presented for review is whether the Petitioner's Section 502(a)(3) claim for $150,000 is one for "equitable relief." Although four sections in ERISA specifically allow legal relief, Section 502(a)(3) is not one of the four, so the second issue should be resolved against the Petitioner. Indeed, this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) also provides the answer to the second issue by showing that, regardless of the label Petitioner attaches to his demand for monetary relief, the $150,000 Petitioner demands is not in the possession of either Respondent and thus Petitioner's requested monetary relief is legal in nature. The Court should affirm the judgment of the Court of Appeals for the Fourth Circuit.

ARGUMENT

I. PETITIONER'S COMPLAINT SEEKS INDIVIDUAL MONETARY RELIEF AND CANNOT BE SAID TO ASSERT A CLAIM FOR PLAN RELIEF UNDER ERISA SECTION 409(A).

A. The Allegations In The Complaint And The Court's Decision In *Mass. Mutual Life Ins. Co. v. Russell* Preclude Petitioner's Ability To Seek Monetary Relief For An Individual Account Under Section 409(a).

Given the procedural posture of this case, the focus of the Court's review should be the Petitioner's Complaint.[4] The Complaint alleges that Petitioner directed the Plan through its administrators, to invest his money in the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan, commonly known as a 401(k) Plan, in a certain way, but Respondents "failed

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[4] This case comes before the Court in a unique procedural posture. The District Court entered judgment for Respondents on the pleadings under FED. R. CIV. P. 12(c). Pet. Br. 11. In deciding a Rule 12(c) motion, courts "apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the Complaint as true and drawing all reasonable inferences in favor of the nonmoving party." *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). While the Court should view the well-pled facts in the Complaint in the light most favorable to the non-moving party, the Court is "not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law." *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989).

to invest Plaintiff's money as directed." Brief in Opp'n, App. 3a, 12a. The Complaint further alleges that, as a result, "the Plaintiff's interest in the plan has been depleted approximately $150,000.00." *Id.* at 3a-4a. The Complaint characterizes the alleged failure to follow directions as a breach of fiduciary duty under ERISA. *Id.* at 4a. The Complaint's prayer for relief states that it seeks individual monetary relief only under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).[5]

Ignoring his Complaint, however, Petitioner has attempted to recast his individual claim for relief under ERISA Section 502(a)(3) as a Section 502(a)(2)/ Section 409(a) claim of fiduciary breach seeking monetary relief for the plan as a whole. *See* Pet. Br. 16-29.

ERISA Section 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities,

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[5] The Complaint's entire prayer for relief demands:

> (1) a declaration from the court that the Defendant has breached its' fiduciary duty pursuant to E.R.I.S.A. 29 U.S.C.S. § 1001 *et. seq.*, (2) for appropriate 'make whole' or other equitable relief pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(a)(3), (3) for a statutory penalty for failure to provide information Plaintiff requested pursuant to E.R.I.S.A.. 29 U.S.C.S. §1132(c), (4) for attorney's fees and costs pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(g), and [5] for such other and further relief as the court deems just and proper.

Brief in Opp'n, App. 4a. Nothing in this list of remedies seeks monetary relief for the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan.

> obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable *to make good to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (2007) (emphasis added). In *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Court ruled that this language permits only "remedies that would protect the entire plan, rather than . . . the rights of an individual beneficiary." *Id.* at 141.

As noted, the Complaint does not allege that Petitioner seeks monetary relief under Section 409(a), nor does it allege that the Petitioner seeks to make good a loss "to the plan." Relying on *Russell*, this Court should reaffirm on this appeal that ERISA Section 409(a) will provide a claim for relief only if a plaintiff seeks relief for a plan in her complaint. Given the procedural posture of this case and the holding of *Russell*, the Court should rule that the failure of Petitioner to allege in his Complaint that he seeks relief for the plan demonstrates that Petitioner seeks individual monetary relief in this case and thus does not state a claim for monetary relief under ERISA Section 409(a).

There is another pleading deficiency in Petitioner's Complaint. The Complaint merely concludes in paragraph XIII that Respondent DeWolff, Boberg

& Associates, Inc., is a "fiduciary." Brief in Opp'n, App. 3a. However, there are no allegations of fact showing *why* it is a "fiduciary" as that term is defined in ERISA Section 3(21)(A). 29 U.S.C. § 1002(21)(A) (2007). A sufficiently particular allegation of fiduciary status is a prerequisite to state a valid claim for a fiduciary breach. *See Varity Corp. v. Howe,* 516 U.S. 489, 498 (1993) (finding that fiduciary status turns on the act or omission at issue, and not on the formal title of plan administrator); *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (finding that plaintiff is obligated to state in his complaint the grounds of his entitlement to relief, which "requires more than labels and conclusions"); and, *see generally, Endsley v. City of Chicago*, 230 F.3d 276, 284 (7th Cir. 2000) (stating that a plaintiff "may plead himself out of court by including factual allegations which, if true, show that his legal rights were not invaded").

Indeed, paragraph XIV of the Complaint alleges that Respondent DeWolff, Boberg & Associates, Inc., "failed to invest Plaintiff's money as *directed*. . . ." Brief in Opp'n, App. 3a-4a (emphasis added). Petitioner's Complaint thus concedes that it was he, as opposed to any fiduciary, who directed and thus controlled the investment of funds in his individual account. A person who undertakes purely ministerial functions within a framework of rules, practices and procedures does not exercise any authority or control with respect to management or disposition of the assets of the plan, and as a result, is not a fiduciary.

See 29 C.F.R. § 2509.75-8, D-2 (2006); *see also IT Corp. v. Gen. American Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997) (noting that discretionary authority means more than the mere "power to err"); *Tegtmeier v. Midwest Operating Eng'rs Pension Trust*, 390 F.3d 1040, 1047-48 (7th Cir. 2004) (noting that misinformation by ministerial employee unique to a participant was not a fiduciary function); and *Kyle Rys., Inc. v. Pacific Admin. Serv.*, 990 F.2d 513, 516-17 (9th Cir. 1993) (noting that an insurance company is not fiduciary when it negligently administered claims under the plan). The Complaint in this case does not state a valid claim for relief under Section 409(a).

B. *Fort Halifax Packing Co. v. Coyne* Provides Additional Support Why Petitioner Does Not Seek Monetary Relief To The Plan Under Section 409(a).

Congress enacted Internal Code Section 401(k) in the Revenue Act of 1978.[6] A 401(k) plan is an "individual account plan" or "defined contribution plan" as defined in ERISA Section 3(34). 29 U.S.C. § 1002(34) (2007). A defined contribution plan, like a 401(k) plan, is a retirement plan that provides for establishment of an individual account for each plan participant. *Id.* Each plan participant's benefits under a defined

[6] Revenue Act of 1978, Pub. L. No. 95-600, § 135(a), 92 Stat. 2763 (1978) (current version at 26 U.S.C. § 401 (2007)).

contribution plan is based on the money contributed by him or by his employer on his behalf to his individual account. *Id.* This arrangement contrasts with defined benefit plans, which pay guaranteed monthly pension benefits out of aggregated plan assets and do not have individual accounts. 29 U.S.C. § 1002(35) (2007).[7] It certainly could be argued that Section 409(a) does not provide a remedy for an investment loss to an individual account occasioned by a failure to comply with a participant's investment instruction, because the monetary relief would always be allocated to the individual account, as opposed to the plan as a whole.

Alternatively, the Court could decide whether the Complaint seeks to make good a loss "to the plan" by deciding whether the plan administrator would exercise administrative discretion upon the plan's

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[7] In 1974 when ERISA was enacted, the predominant form of retirement plan was the defined benefit plan. *See* Employee Benefits Security Admin., U.S. Dept. of Labor, Private Pension Plan Bulletin Historical Tables, Table E8 (March 2004), *available at* http://www.dol.gov/ebsa/pdf/privatepensionplanbulletinhistoricaltables.pdf (noting that in 1975, of a total 38 million retirement plan participants in the United States, 27 million participated in defined benefit pension plans and 11 million participated in defined contribution pension plans). Over the years, defined contribution plans have replaced the defined benefit plan as the predominant form of ERISA retirement plans. *See* U.S. Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, Employer-Sponsored Health and Retirement Benefits, Efforts to Control Employer Costs and the Implications for Workers, pg. 31 (March 2007), *available at* http://www.gao.gov/new.items/d07355.pdf.

receipt of money and thereby involve the plan in a meaningful way. A single, one-time payment of money to Petitioner would have no effect whatsoever on the administration and operation of the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan, and thus should not be seen to constitute relief "to the plan" within the meaning of Section 409(a).

To guide this Court's analysis of whether a single, one-time payment of money, would go "to the plan," the *Amici* suggest that the Court review its reasoning in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1. In *Fort Halifax*, the Court determined that a single benefit payment "hardly constitutes the operation of a benefit plan"; rather than trigger any plan obligations or responsibilities, an employer does "little more than write a check." *Id.* at 12. The Court stated as well in *Fort Halifax* that a precondition to the establishment of an ERISA plan is a "uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Id.* at 9. Similarly, the United States Department of Labor takes the view in its regulations that mere "compensation" payments are not payments by an ERISA benefit plan. 29 C.F.R. § 2510.3-1(b) (2006).

If the Complaint in this case makes any Section 409(a) allegation at all, it alleges, at most, that the DeWolff, Boberg & Associates, Inc., Employees' Savings Plan would act as a mere pass-through for any monetary relief to Petitioner. Giving every possible benefit of the doubt to Petitioner, the Complaint still

fails to allege any impact on the plan's administrative scheme or any exercise of the plan administrator's discretion in allocating $150,000 to the Petitioner. Nothing in the Complaint alleges what the Plan would do upon receipt of that money other than to pass it on *in toto* to Petitioner. The only possible inference from the Complaint is that the Plan, at most, would serve as a mere stopping point for the $150,000 requested by Petitioner, on its way to Petitioner. The monetary relief in this case thus resembles the single, one-time payment of money in *Fort Halifax*. Just as that payment did not establish an ERISA plan, so too the monetary relief of a single payment of $150,000 demanded by Petitioner is not "plan" relief. For this additional reason, the Court should find that the Complaint does not state a claim for monetary relief under ERISA Section 409(a).

II. IF PETITIONER PREVAILS, THE FOCUS OF SECTION 409(A) WOULD TURN TO INDIVIDUAL CONSEQUENTIAL DAMAGE CLAIMS AND WOULD TIP THE DELICATE CONGRESSIONAL BALANCE THAT ENCOURAGES, IN PART BY LIMITING REMEDIES, THE VOLUNTARY ESTABLISHMENT OF EMPLOYEE BENEFIT PLANS.

ERISA regulates private sector employee benefit plans. 29 U.S.C. § 1003(a) (2007). The statute's regulatory scheme does not come into play, however, unless and until, the employer voluntarily chooses to establish an ERISA plan. *See, e.g., Shaw v. Delta Air*

Lines, Inc., 463 U.S. 85, 91 (1983). To encourage employers to establish ERISA plans, Congress devised the ERISA statutory scheme to limit remedies associated with fiduciary or other breaches of ERISA standards. The legislative history of ERISA proves this point: "It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed." H.R. CONF. REP. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5167, *and in* 3 LEGISLATIVE HISTORY OF ERISA at 4673 (1976) (statement of Rep. Ullman, Member, House Comm. On Ways and Means). This statutory scheme is more than unique; it is "comprehensive and reticulated," *Nachman v. PBGC*, 446 U.S. 359, 361 (1982), and one with which this Court is "reluctant to tamper." *Russell*, 473 U.S. at 147.

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court recognized the importance of limited remedies in the ERISA statutory scheme: "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 54. Likewise, in *Mertens v. Hewitt Assocs.*, the Court remarked: "ERISA is an

enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." 508 U.S. at 262-63. Congress clearly decided when it enacted ERISA that creating a civil enforcement scheme of specific remedies will serve the greater good of encouraging private sector employers to establish employee benefit plans and to enhance the benefits provided under those plans. Any judicial expansion of the relief permitted under Section 409(a) would tip the delicate balance struck by Congress in enacting ERISA.[8]

Upsetting that balance by expanding Section 409(a) remedies would cause severe repercussions. ERISA's scheme has generated an impressive degree of coverage in ERISA plans for tens of millions of American workers. Approximately 51% of the private sector workforce in this country, or about 64 million Americans, participate in at least one type of employer-sponsored retirement plan.[9]

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[8] As Petitioner aptly points out, expanding Section 409(a) remedies in the way he advocates not only would affect pension plans, but would also affect welfare plans: "Although this case involves a pension plan and not a welfare plan, resolution of the questions presented will likely have a significant impact on both pension *and* welfare plans." Pet. Br. 4 n. 1 (cont'd) (emphasis in original).

[9] Bureau of Labor Statistics, U.S. Dept. of Labor, National Compensation Survey: Employee Benefits in Private Industry, Table 1 (March 2007), *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf and Bureau of Labor Statistics, U.S. Dept. of

(Continued on following page)

Changes in the law of employee benefits have a real impact on the decision-making process of both employers and employees, and thus affect the success of the ERISA scheme:

> Legal changes, such as the introduction of 401(k) plans, can change the benefit packages available to employees or change the advantages employees can receive from those benefits. Changes in the law can prompt employers to offer plans or discourage them from doing so. Likewise, employees may change their decision to participate in a plan based on legal changes. For example, if a law or regulation change made it more difficult for employees to get access to funds in a defined contribution plan, they might be less inclined to participate in the plan.

William J. Wiatrowski, *Medical and Retirement Plan Coverage: Exploring The Decline In Recent Years,* MONTHLY LAB. REV., pg. 30, August 2004.

ERISA, of course, covers much more than pension plans. Its reach in the welfare benefit plan context extends to medical, surgical, hospital care, sickness, accident, disability, death, unemployment, vacation, apprenticeship, day care, scholarship and prepaid legal service plans. *See* 29 U.S.C. § 1002(1)(A)

Labor, Employment Situation, Table A (July 2007), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf (as of July 2007, the employed civilian labor force totaled approximately 146 million, of which approximately 22 million were employed by the government).

(2007). In Petitioner's own words, "[t]he importance of ERISA today can hardly be overstated." Pet. Br. 4.

If the Court accepts Petitioner's position on the first issue presented for review, the delicate balance between limited remedy and voluntary establishment of plans would not endure. Section 409(a) would extend to an entirely new set of claims for individual, consequential monetary relief that otherwise would be addressed under Section 502(a)(3). For example, if Petitioner prevails, an ERISA plan beneficiary, who believes that a failure to follow instructions to designate her as a beneficiary is the fault of the plan administrator, could file a Section 409(a) action claiming that the administrator caused the consequential loss of benefits "to the plan."[10] If Petitioner prevails, an ERISA plan participant, who incurs additional taxes by virtue of the plan administrator's failure to advise him clearly of tax consequences of his decision to draw down or forego benefits, could commence a Section 409(a) action seeking to recover the value of the additional taxes incurred "to the plan."[11] If Petitioner prevails, an ERISA plan participant, who enrolls in a plan but whose insurance premium does not reach the insurance company due to an administrative oversight, could file a Section

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[10] The holding in *Todisco v. Verizon Commc'n*, No. 06-1957, ___ F.3d ___, 2007 WL 2231733, *4 (1st Cir. Aug. 6, 2007), therefore, would be implicitly overruled.

[11] The holding in *Farr v. U.S. West Commc'ns, Inc.*, 151 F.3d 908 (9th Cir. 1998), therefore, would be implicitly overruled.

409(a) action seeking the consequential damages "to the plan."[12] And, if Petitioner prevails, a 401(k) plan participant whose investment instructions are misread by an errant computer could file a Section 409(a) action claiming that the failure caused a loss "to the plan."[13]

In a case remarkably similar to the instant dispute, the Court of Appeals for the Sixth Circuit found that the participant's requested remedy – the difference between the value of his 401(k) account had his instructions been followed and the actual value of his account – constituted monetary damages and was not an equitable remedy permitted under Section 502(a)(3). *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477, 481 (6th Cir. 2001), *cert. denied*, 535 U.S. 928 (2002). The Sixth Circuit rejected the participant's argument that he was merely seeking restitution of the benefits he could have earned had the plan fiduciary followed his instructions to invest in higher performing mutual funds. *Id.* The plan fiduciary itself had neither wrongfully retained any funds nor profited from the failure to follow the

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[12] The holding in *Hughes v. Legion Ins. Co.*, No. 03-0993, 2007 WL 781951 (S.D. Tex. March 12, 2007), therefore, would be implicitly overruled.

[13] These hypothetical examples become more likely as the baby boomer generation approaches retirement and finds that its retirement benefits do not meet its monetary needs. As this phenomenon occurs, more Americans may turn to the courts, if Petitioner prevails, with 20/20 hindsight, to correct through ERISA Section 409(a) unfortunate investment choices.

participant's instructions, and thus there was nothing to "restore" to the participant. *Id.* Petitioner's Section 409(a) argument in this case is an attempt to circumvent this and other holdings through the simple artifice of demanding in his briefs monetary relief "to the plan."

There is a cost associated with any expansion of remedies, even for non-meritorious claims. Judicial expansion of ERISA remedies beyond what Congress intended would encourage more litigation. This Court's recent decision in *Bell Atlantic Corp. v. Twombly* recognized the staggering cost and burden of modern litigation: "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [the summary judgment stage of the] proceedings." 127 S.Ct. at 1967. The threat of discovery expense is particularly severe in light of the recent e-discovery amendments to the Federal Rules of Civil Procedure.[14] If the Court of Appeals is reversed on the first issue presented for review, the resulting expansion of ERISA Section

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[14] Electronic discovery responses easily reach millions of dollars in costs if several years' worth of archived email and files must be preserved, restored, searched and reviewed to remove non-relevant confidential material. *See, e.g., In re Vioxx Prods. Liability Litig.*, No. 1657, ___ F.Supp.2d ___, 2007 WL 2309877 (E.D. La., Aug. 14, 2007) (lamenting the burden of e-discovery on responding parties, reviewing courts, and the system of justice); *see also* Don Clark and Peg Brickley, *Intel's Email Recovery Effort Is Set to Cost 'Many Millions,'* WALL ST. J. April 25, 2007; Page B11 (reporting on *In re Intel Corp. Microprocessor Litig.*, No. 05-1717 (D. Del. commenced Nov. 8, 2005)).

409(a) remedies will impose unpredictable but substantial costs on employers and other plan sponsors.

The total compensation cost (comprising wages and benefits) for private employers already has increased as a direct result of added costs of health and retirement benefits.[15] This phenomenon has affected employer-sponsored benefit choices. "Rising health care and retirement costs affect both employers and employees. Employers may turn to using more contingent workers to whom they may not need to pay benefits and to a workforce overseas. From the employees' perspective, as the cost of benefits rises, they will be confronted with continued trade-offs in their compensation packages."[16] Indeed, according to the U.S. Census Bureau, the percentage of workers who received employment-based health insurance has steadily declined from 2000 to 2006.[17]

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[15] U.S. Government Accountability Office, Report to Congressional Requesters, Employee Compensation, Employer Spending on Benefits Has Grown Faster Than Wages, Due Largely to Rising Costs of Health Insurance and Retirement Benefits, pg. 2 (February 2006), *available at* http://www.gao.gov/new.items/d06285.pdf.

[16] *See id.* at 26.

[17] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2006, pg. 18, and Fig. 6 at pg. 19 (August 2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf.

Additionally, employers hesitate to take on fiduciary responsibilities out of a fear of liability.[18] More employers are offering automatic enrollment in 401(k) plans, which can increase participation rates. However, "[s]ome experts are concerned that employers may choose low-risk default investments – which may provide inadequate returns – to avoid fiduciary liability that might be related to higher-risk investments."[19] There is a concern as well that participants often possess little financial knowledge and may not choose appropriate investments. Although some employers offer one-on-one counseling, Internet-based education and telephone hotlines, other employers choose not to offer these investment tools because of concerns of fiduciary liability.[20] Volatility in benefit costs associated with defined benefit plans also has caused employers either not to offer defined benefit plans or to freeze the plans.[21]

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[18] Fiduciary liability insurance costs have increased, in part because of increased ERISA litigation. *See Survey Finds Massive Cost Increases for Pension Fund Liability Insurance*, 30 Pens. & Ben. Rep. 1691 (BNA) (Aug. 5, 2003).

[19] *See* U.S. Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, Employer-Sponsored Health and Retirement Benefits, Efforts to Control Employer Costs and the Implications for Workers, pg. 35 (March 2007), *available at* http://www.gao.gov/new.items/d07355.pdf.

[20] *Id.* at 36.

[21] *Id.* at 34 (Eighty-two percent of employers who froze or terminated their defined benefit plans cited cost volatility as a significant factor).

It is noteworthy that this Court has reversed the Court of Appeals for the Ninth Circuit in particular in a number of ERISA cases.[22] In one such case, *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), the Ninth Circuit expanded ERISA's remedies to hold an employer liable for a breach of fiduciary duties when it decided to amend a retirement plan and offer eligible employees incentives to accept early retirement. This Court reversed, finding that the Ninth Circuit erred when it failed to make a threshold determination whether the employer was acting as a fiduciary (which it was not) and stated that the act of amending the plan did not constitute a transfer or use of plan assets for the benefit of the employer. *Id.* at 891-92. It could be argued that the Ninth Circuit's expansion of ERISA remedies, although often reversed by this Court, has

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[22] "The frequency of the Ninth Circuit's reversals has been even greater in recent times: over the past twenty-one Supreme Court terms (since the Fifth Circuit was split), the Ninth Circuit has been reversed an average of 14.48 times, with the next closest circuit (the 'new' Fifth) reversed 5.14 times per term over the same time period." Kevin M. Scott, *Supreme Court Reversals of The Ninth Circuit*, 48 Ariz. L. Rev. 341, 341 (2006).

This record applies to the Ninth Circuit's attempt in ERISA cases to expand claims. *See, e.g., Beck v. Pace Int'l Union*, 427 F.3d 668 (9th Cir. 2005) (holding that a merger is a not permissible form of plan termination under ERISA), *rev'd*, 147 S.Ct. 2310 (2007); *Nord v. Black & Decker Disability Plan*, 296 F.3d 823 (9th Cir. 2002) (holding that courts may require plan administrators to accord special weight to treating physicians), *rev'd*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 105 F.3d 1288 (9th Cir. 1997) (holding that amending a plan implicated ERISA fiduciary duties), *rev'd*, 525 U.S. 432 (1999).

adversely affected the establishment and enhancement of ERISA plans within that Circuit. It recently has been reported, in the welfare benefit plan context, that in California more than 75% of the 6.5 million Californians who were uninsured at some point in 2005 are reported to have either worked for an employer who did not offer health benefits or were ineligible for such benefits.[23]

It is the position of the *Amici* that the Court should not judicially create remedies in Section 409(a) that do not now exist in the statute, given the dramatic, negative consequences of an expansion of remedies on the establishment and enhancement of ERISA-covered benefit plans.

III. PETITIONER'S SURCHARGE ARGUMENT CONFLICTS WITH THIS COURT'S DECISION IN *MERTENS V. HEWITT ASSOCS.* THAT CHARACTERIZES PETITIONER'S REQUESTED RELIEF AS LEGAL RELIEF.

The Complaint seeks "appropriate 'make whole' or other equitable relief pursuant to E.R.I.S.A., 29 U.S.C.S. § 1132(a)(3). . . ." Brief in Opp'n, App. 4a. Section 502(a)(3)(B)(i) allows "appropriate equitable relief to redress" a fiduciary breach. 29 U.S.C. § 1132(a)(3)(B)(i). The second question presented for

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[23] Frederick L. Pilot, *Employer-Based Coverage Eroding Throughout California, New Studies Report*, 7 Pen. & Ben. Daily 134 (Pen. & Ben. Rep.) (BNA) (July 13, 2007).

review is whether Petitioner's request for "make whole" relief seeks "equitable relief" or whether it constitutes "legal relief" not within the scope of Section 502(a)(3)(B)(i).

Four provisions in ERISA expressly allow "legal" relief: Section 502(g)(2)(E) and Section 4301(a)(1), which allow claims dealing with employer collective bargaining agreements and withdrawal liability obligations to multi-employer benefit plans, and Section 104(a)(5)(C) and Section 4003(e)(1), which allow certain Secretary of Labor and Pension Benefit Guaranty Corporation claims. 29 U.S.C. §§ 1132(g)(2)(E), 1451(a)(1), 1024(a)(5)(C) and 1303(e)(1) (2007). In the context of a very carefully crafted statute, the only reasonable inference one can draw from Congress's failure to use the word "legal" in Section 502(a)(2) and Section 502(a)(3) and its use of that word in four other sections not at issue here is that Congress did not intend to provide legal relief under Section 502(a)(3). That inference is supported by ERISA's legislative history, which shows that an earlier version of Section 409(a) allowed "legal or equitable" relief and was amended to delete the word "legal." *See Russell*, 473 U.S. at 145-46 & n. 14 (citing legislative history).

In keeping with this reasonable inference, this Court already has answered the second issue presented for review in *Mertens v. Hewitt Assocs.*, 508 U.S. 248. The allegations in the complaint in *Mertens* were strikingly similar to those in the Complaint in this case. The *Mertens* plaintiffs sued a non-fiduciary

who allegedly participated in a fiduciary breach under Section 502(a)(3): "Petitioners contend that requiring respondent to make the Kaiser plan whole for the losses resulting from its alleged knowing participation in the breach of fiduciary duty by the Kaiser plan's fiduciaries would constitute 'other appropriate equitable relief' within the meaning of § 502(a)(3)." 508 U.S. at 253.[24] This Court reasoned: "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief." *Id.* at 255 (emphasis in original). In this case, Petitioner likewise seeks compensatory damages for a loss sustained as a result of an alleged breach of fiduciary duties. It is impossible to characterize Petitioner's request for monetary relief in any other way, since his Complaint expressly seeks "make whole" monetary relief.

The Court's more recent decisions in *Great-West Life & Annuity Ins. Co., v. Knudson*, 534 U.S. 204 (2002) and *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S.Ct. 1869 (2006), confirm that Petitioner seeks legal, and not equitable, relief when he demands "make whole" money. In *Great-West*, the Court reasoned that whether a demand for money is legal or

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[24] The *Mertens* plaintiffs did not sue for relief under Sections 409(a) and 502(a)(2) because they sued nonfiduciaries, which are not proper defendants under those sections.

equitable "depends on the basis for the plaintiff's claim *and the nature of the underlying remedies sought*." *Id.*, 534 U.S. at 213 (quotation marks and brackets omitted; emphasis added). The Court added that a plaintiff could seek money as an equitable remedy "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* In *Sereboff*, the Court reiterated that monetary equitable relief is a function of the court's ability to impose a constructive trust or equitable lien on particular funds or property in the defendant's possession. *Id.*, 126 S.Ct. at 1874. The Complaint in this case does not seek to recover any money or property in Respondents' possession; indeed, it acknowledges that no such money or property exists, as the Complaint seeks to recover money equal to a lost investment opportunity (as opposed to money that the defendant took from the plan, or money that defendant earned from money taken from the plan). The claim in *Great-West* was "not that respondents *hold* particular funds that, in good conscience, belong to petitioners," *id.*, 534 U.S. at 214 (emphasis added), or that "identifiable funds (or property) belonging to the plaintiff and held by the defendant," *id.* at 216, and the claim in this case is not that Respondents hold any identifiable money that belongs to Petitioner.

That Petitioner labels his requested monetary relief "surcharge" is of no moment. Petitioner concedes that his definition of "surcharge" "may superficially appear akin to compensatory damages," Pet. Br.

37, but the resemblance is more than superficial. Petitioner argues that surcharge is equitable because it can be described as "restitutionary." *Id.* The remedy of equitable restitution, however, can apply only if a defendant holds particular funds that in good conscience belong to a plaintiff.[25] Respondents in this case do not possess any property or ill-gotten profits to return to the Petitioner. Lack of possession was the precise reason why petitioner in *Great-West* could not recover, and the same reasoning must apply in this case: "The basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits

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[25] This Court has defined "equitable relief" by reference to DAN B. DOBBS, DOBBS LAW OF REMEDIES (West) (1993). *Great-West*, 534 U.S. at 213. DOBBS cannot be read to view "surcharge" as equitable relief distinct from equitable restitution and constructive trust. "In the constructive trust case the defendant has legal rights to something that in good conscience belongs to plaintiff. The property is 'subject to a constructive trust,' and the defendant is a 'constructive trustee.' The defendant is thus made to transfer title to the plaintiff who is, in the eyes of equity, the true 'owner.'" DOBBS, § 4.3(1).

> When equity imposes a constructive trust upon an asset of the defendant, the plaintiff ultimately gets formal legal title. The effect is to allow the plaintiff to recover the asset in specie. For instance, the plaintiff may recover legal rights to Blackacre itself, or a particular bank account, or rights in an intangible such as a trademark, *not merely a money judgment equal to the value of such assets.* If the asset has increased in value, the plaintiff gets the increase.

Id. § 4.3(2) (emphasis added).

that they conferred." 534 U.S. at 715 (emphasis in original).[26]

Following *Mertens*, *Great-West* and *Sereboff*, Petitioner is wrong to urge this Court to recognize surcharge as an equitable remedy "notwithstanding any compensatory purpose it may serve." Pet. Br. 40. If the Court accepts Petitioner's attempt to recast his request for legal relief by calling it "surcharge," the Court would be rejecting the reasoning of these three of its prior decisions.

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[26] The Court of Appeals for the Eighth Circuit has rejected a "surcharge" argument like that of the Petitioner, in *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058 (8th Cir. 2006). In an attempt to recast his request for compensatory damages, plaintiff there had argued (without success) that Section 502(a)(3) permits a monetary "surcharge" upon the fiduciary for his breach and therefore is a form of an equitable relief permitted by ERISA.

CONCLUSION

The Court should affirm the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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JAMES LARUE, PETITIONER,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC. EMPLOYEES' SAVINGS PLAN, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF *AMICI* CURIAE

Amici curiae respectfully submit this brief in support of the petitioner, James LaRue, urging the reversal of the judgment of the United States Court of Appeals for the Fourth Circuit, because that judgment is inconsistent with the language and intent of the ERISA statute and with this Court's precedent.[1]

Amici are law professors at eleven law schools throughout the United States who teach and write about various subjects (*e.g.*, ERISA remedies,[2] duties of ERISA fiduciaries,[3] class action litigation,[4] financial market regulation[5]) that relate to the questions presented by this case: (1) whether 29 U.S.C. §§ 1132(a)(2) and 1109, sections 502(a)(2) and 409 of ERISA respectively, permit a participant of a "defined contribution plan" to bring an action for losses attributable to his account caused by a fiduciary breach and (2) whether 29 U.S.C. §§ 1132(a)(3), section

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[1] This brief is submitted pursuant to the consent of the parties to the filing of *amicus curiae* briefs. Petitioner's general consent for the filing of *amicus curiae* briefs was filed with the Court on July 27, 2007. Respondents' consent, dated July 30, 2007, is included herein. Pursuant to this Court's Rule 37.6, *amici curiae* represent that this brief was not authored, in whole or in part, by counsel for any party and that no party other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The names of the educational institutions are provided for identification purposes only.

[2] *See, e.g.*, Roger Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L. Rev. 595 (2004).

[3] *See, e.g.*, Paul Secunda, *Inherent Attorney Conflicts of Interest Under ERISA: Using the Model Rules of Professional Conduct to Discourage Joint Representation of Dual Role Fiduciaries*, 39 J. Marshall L. Rev. 721 (2006).

[4] *See, e.g.*, John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. Ill. L. Rev. 903 (2005).

[5] *See, e.g.*, Frank Partnoy, *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets*.

502(a)(3) of ERISA, permits a participant of a "defined contribution plan" to bring an equitable surcharge action for monetary "make-whole" relief to compensate for losses caused by a breaching fiduciary.[6] Moreover, as professors who teach and write about civil procedure[7] and federal jurisdiction,[8] *amici* also have an interest in the issues raised by Respondents' motion to dismiss the writ.

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[6] Because LaRue is clearly entitled to proceed under section 502(a)(2) of ERISA, it is unnecessary for this Court to decide the section 502(a)(3) question. Should the Court reach the 502(a)(3) question, *amici* agree with Petitioner that the historically equitable remedy of surcharge can provide "make-whole" relief against breaching trust fiduciaries. Surcharge is intended to serve as a sanction against a fiduciary for the mismanagement of an account. *See Restatement (Second) of Trusts* § 199 (1959) (explaining that such remedy is intended to "compel the trustee to redress a breach"); Story, 1 *Eq. Jur.* § 525 ("A surcharge is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be allowed."). The appropriate amount of surcharge relief can be measured by "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." *See Restatement (Third) of Trusts* § 205, cmt. a (1992). The remedy, deeply rooted in the tradition of the English Court of Chancery, was typically available at the time of the divided bench. *See Duvall v. Craig*, 15 U.S. (2 Wheat.) 45, 56 (1917) ("A trustee, merely as such, is, in general, only suitable in equity."). Accordingly, the Court's requirements for seeking appropriate equitable relief under Section 502(a)(3), set forth in *Mertens v. Hewitt Assocs.*, 508 U.S. 28 (1993); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); and *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S. Ct. 1869 (2006), are satisfied.

[7] *See, e.g.*, John Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522 (2007).

[8] *See, e.g.*, Radha A. Pathak, *Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction*, 85 Or. L. Rev. 59 (2006).

SUMMARY OF ARGUMENT

Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 to protect employees in employer-based pension and welfare plans. It passed the legislation "[a]fter several highly visible pension plan failures and abuses in the 1960s and early 1970s." United States General Accounting Office, Report to Congressional Requesters, Employer-Based Managed Care Plans, ERISA's Effect on Remedies for Benefit Denials and Medical Malpractice 4 (1998), available at http://www.gao.gov/archive/1998/he98154.pdf (last visited on July 25, 2007). Congress recognized that "frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them." Remarks of Sen. Ribicoff, *reprinted in* 3 Leg. Hist. 4811; 120 Cong. Rec. 29957 (1974). As such, Congress deemed it necessary to create a broad federal system of requirements and safeguards designed to protect employees. *See* Ellen A. Fredel, *ERISA and Managed Care: What the Courts are Saying*, 8 Benefits L.J. 105 (1995). In particular, Congress sought to "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." Remarks of Sen. Bentsen, *reprinted in* 3 Leg. Hist. 4795; 120 Cong. Rec. 29954 (1974); *see also* Remarks of Rep. Biaggi, *reprinted in* 3 Leg. Hist. 4661; 120 Cong. Rec. 29196-29197 (1974) ("This bill will establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds"); Remarks of Rep. Dent, *reprinted in* 3 Leg. Hist. 4668; 120 Cong. Rec. 29206 (1974) ("These standards ... will prevent abuses ... by those dealing with plans."). Consistent with such legislative history, this Court has recognized that "[s]pecial congressional concern" has focused on preserving the integrity of plan asset management. *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).

ERISA regulates "employee benefit plan[s]," which are defined as "employee welfare benefit plan[s]," "employee pension benefit plan[s]," or plans that are both welfare and pension benefit plans. 29 U.S.C. § 1002(3) (defining "employee benefit plan"), § 1003 (describing coverage of Chapter 18, subchapter I). Employee welfare benefit plans include, *inter alia*, employee health insurance and disability plans. 29 U.S.C. § 1002(1). An employee pension benefit plan is a retirement plan, and it can be structured as either a defined benefit plan or a defined contribution plan. 29 U.S.C. § 1002(34) ("defined contribution plan"); §1002(35) ("defined benefit plan"). A defined benefit plan is a plan that promises certain, specified benefits to employees when they retire. The typical defined benefit plan promises a certain amount of money – often some percentage of the employee's salary – to the retiree per month for the rest of his or her life. A defined contribution plan, by contrast, does not promise a certain sum of money to the retiree. Rather, the employee (and perhaps also the employer) make contributions over time to the employee's individual account within the plan, the plan fiduciaries invest those contributions in the hope that they will grow at a favorable rate, and, upon retirement, the employee withdraws funds from his or her individual account.

As "the crucible of congressional concern was a misuse and mismanagement of plan assets by plan administrators," *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985), Congress has imposed significant duties on the persons responsible for retirement plans – the fiduciaries in charge of plan management. *See* 29 U.S.C. § 1104(a). The duties imposed on ERISA fiduciaries are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).[9] Breach of those duties, there-

[9] *Donovan v. Bierwirth* has been cited by numerous other federal courts of appeals, including *LaScala v. Scrufari*, 479 F.3d 213, 219 (2d Cir.

fore, cannot be taken lightly: ERISA's enforcement scheme contemplates the availability of civil remedies against fiduciaries who fail to comply with their responsibilities. At issue in this case are two of ERISA's civil enforcement provisions: sections 502(a)(2) and 502(a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3) respectively. In this brief, *amici* will address the disputed issues surrounding 502(a)(2).

By denying LaRue the opportunity to proceed under section 502(a)(2), the Fourth Circuit's holding undermines the availability of ERISA's important and well integrated remedial provisions. The Fourth Circuit's holding that LaRue failed to allege a loss to the plan within the meaning of section 502(a)(2) proceeds from a fundamental misunderstanding of the composition and functioning of a defined contribution plan. Where a fiduciary's breach of duty causes a diminution in the total assets of the plan, it can be seen as nothing other than a loss to the plan within the meaning of section 502(a)(2). The total assets of a defined contribution plan are nothing more than the aggregation of the value of each individual account within the plan. As such, it is entirely irrelevant that the diminution in value occurred within the boundaries of one individual participant's account; appropriate remediation for the loss to the account, and hence to the plan, is available under section 502(a)(2).

Furthermore, LaRue's withdrawal of funds from his account with the DeWolff, Boberg & Associates, Inc. Employees' Savings Plan (the "DeWolff Plan") does not necessitate dismissal of the writ as moot. LaRue's claim accrued at the time the plan fiduciaries failed to perform their duties. His individual account balance – and therefore the total assets of

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2007); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 444 (6th Cir. 2002); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000); *Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1361 (11th Cir. 1997); and *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996).

the plan – would have been greater had such breaches not occurred. The DeWolff Plan will benefit from any recovery that LaRue's lawsuit may produce. In turn, LaRue individually will be entitled to an appropriate plan apportionment of that recovery, even though he has withdrawn his funds from his account. As such, there remains a live controversy for this Court to resolve.

ARGUMENT

I. RELIEF UNDER ERISA § 502(A)(2) IS AVAILABLE WHERE, AS HERE, THE DIMINUTION IN VALUE OF AN INDIVIDUAL ACCOUNT REFLECTS A DIMINUTION IN VALUE OF THE TOTAL ASSETS OF THE PLAN.

ERISA section 502(a)(2) provides that "[a] civil action may be brought...by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section [409]." 29 U.S.C. § 1132(a)(2). ERISA section 409(a) provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach..." 29 U.S.C. § 1109(a).

The Fourth Circuit erred in holding that section 502(a)(2) relief is unavailable to LaRue. In his complaint, LaRue alleged that the DeWolff Plan fiduciaries failed to follow his investment instructions and that "his interest in the Plan [was] depleted approximately $150,000 as a result. Br. in Opp'n., App. 3a (Complaint, ¶ XIV). Contrary to the Fourth Circuit's holding, such a loss to LaRue's individual account necessarily entailed a loss to the DeWolff Plan as a whole. A defined contribution plan is nothing more than the sum of its individual accounts. As a result, a defined contribution plan may well be affected by losses that occur within the boundaries of any one individual account. Such a loss is

no less significant than the losses that are visited upon a group – or all – of the individual accounts in the plan. The Fourth Circuit's holding to the contrary is inconsistent with ERISA's regulatory scheme and the well–established precepts of trust law upon which ERISA is founded.

A. Fiduciaries' Conduct Toward An Individual Account Holder Constitutes Conduct Toward The Plan As A Whole.

The Fourth Circuit construed LaRue's theory of recovery as individualized, rather than sufficiently focused on the plan as a whole. Pet. for Writ of Cert., App. 6a. In rejecting LaRue's section 502(a)(2) claim as one for individual relief, the Fourth Circuit created a false dichotomy between the plan on one hand and LaRue as an individual account holder on the other. One of the essential characteristics of a defined contribution plan is the fact that it is comprised of individual accounts. ERISA's definition makes this point clear:

> The term "individual account plan" or "defined contribution plan" means a pension plan *which provides for an individual account for each participant* and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1002(34) (emphasis added). The statute itself defines the plan by reference to its individual components.

Contrary to the Fourth Circuit's understanding, a breach of a fiduciary duty owed to an individual account holder may well constitute a breach of duty owed to the plan itself. As such, it is not helpful to distinguish between a breach of fiduciary duty towards one participant (and the loss that attends such a breach) and the breach of duty towards many of the participants within the plan.

The plain language of ERISA reflects Congress's position that actions taken with respect to a participant or his or her individual account may be with respect to the plan as a whole. For example, ERISA states that "a person is a fiduciary *with respect to a plan* to the extent ... he renders investment advice for a fee. . . ." 29 U.S.C. § 1002(21) (emphasis added). The United States Department of Labor (the "Department") has interpreted this provision to include a person who provides investment advice for a fee to a single participant. *Cf.* 29 C.F.R. § 2509.96-1 (clarifying the circumstances under which a person who renders investment advice for a fee to any participant will be considered a fiduciary of the plan). Thus, a person's conduct towards one participant may render the person a fiduciary towards the plan as a whole.

Similarly, ERISA's prohibited transaction rules indicate that even a transaction involving only one participant's account may be a transaction of the plan as a whole. ERISA section 406(a) prohibits fiduciaries from "caus[ing] the plan to engage in a transaction" that constitutes the direct or indirect lending of plan assets, unless an exemption applies. 29 U.S.C. § 1106(a)(1)(B). The Department has issued regulations stating that the failure by a plan sponsor – usually the employer who set up the retirement plan – to contribute 401(k) salary deferrals to a retirement plan results in a prohibited loan from the plan to the plan sponsor. *See* 29 C.F.R. § 2510.3-102 (stating that "the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan."). In other words, if a plan sponsor fails to timely transfer the funds that an employee has directed to be withheld from his paycheck for retirement, the plan sponsor can be considered to have caused "the plan" to have engaged in a prohibited loan. This is the case even if the plan sponsor

fails to timely convey only one employee's salary withholdings to the plan. That is, "the plan" will have engaged in a prohibited transaction (a prohibited loan to the plan sponsor) even if the plan sponsor retained the deferred salary for only one individual account.

B. The Manner By Which A Defined Contribution Plan Functions Makes Clear That The Plan May Be Harmed By Losses To Individual Accounts.

ERISA's remedial scheme must be interpreted in light of the structure of a defined contribution plan as a collection of individual accounts. This Court need only analyze that structure, as well as how defined contribution plans function as a practical matter, to understand that a loss to an individual account within a defined contribution plan can constitute a loss to the plan as a whole and can thus be properly redressed under section 502(a)(2).

1. A defined contribution plan's assets are nothing more than the assets in each of the plan's individual accounts.

A defined contribution plan's assets consist of all of the assets within each individual account in the plan. Dan M. McGill *et al.*, Fundamentals of Private Pension 247 (7th ed. 1996) ("[T]he sum of all the account balances . . . equals the total market value of the plan's assets.").[10] That is, in a defined contribution plan, the assets in each participant's individual account plan collectively comprise the corpus of a

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[10] Further, lower courts have recognized that even employee contributions that are withheld by the employer and not received by the plan still qualify as plan assets that may be recovered as a loss to the plan under section 502(a)(2). *See, e.g., U.S. v. Grizzle*, 933 F.2d 943, 947 (11th Cir. 1991); *Livers v. Ming Y Wu*, 6 F. Supp. 2d 921, 928 (N.D. Ill. 1998); *Prof'l Helicopter Pilots Ass'n v. Denison*, 804 F. Supp. 1447, 1453 (M.D. Ala. 1992); PBGC v. Solmsen, 671 F. Supp. 938, 945-46 (E.D.N.Y. 1987).

trust. The assets in each participant's individual account consist of all individual account contributions (*e.g.*, amounts that the employee chooses to have withheld from his or her salary and the "matching" or profit sharing amounts provided by employers) as well as earnings (*e.g.*, money earned by investment of the contributions).

The assets of a defined contribution plan are held in a unitary fashion and legally owned by one or more trustees. *See* 29 U.S.C. § 1103(a); 26 U.S.C. § 401(a). Participants do not own their individual accounts. Indeed, a bedrock principle of trust law is that title to trust assets are held by trustees for the benefit of trust beneficiaries. *See* Charles E. Rounds, *Loring: A Trustee's Handbook* 1 (2001) ("[T]itle [held by a trustee] and asset aggregation are the keys to unlocking the secret of the trust."). The Department's regulations make clear that participant contributions become plan assets subject to ERISA, "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets," 29 C.F.R. § 2510.3-102(a), (b), and no later. In other words, the portion of an individual's salary that is withheld for investment in a retirement plan becomes a "plan asset" very quickly.

Since participants and beneficiaries will ultimately rely on the funds in a particular individual account, the significance of such accounts' existence cannot be denied. In many important respects, however, the individual accounts turn out to be symbolic. As contributions and earnings cause the plan assets to grow, they are allocated to individual participants' accounts. David A. Littell *et. al.*, *Retirement Savings Plans: Design, Regulation, and Administration of Cash or Deferred Arrangement* 6 (1993) ("[A]s amounts are contributed to the trust, they are allocated to the participant's account."). But the allocation does not represent any formal transfer of ownership to the participant. "[A] qualified trust may . . . not allow the participant to have the right to ac-

quire, hold, and dispose of amounts attributable to the participant's account balance at will." Rev. Rul. 89-52, 1989-1 C.B. 110. The assets remain in the control of the plan fiduciaries for the benefit of the plan (and participants and beneficiaries). Thus, while it is certainly true that the defined contribution plan is comprised of individual accounts, it is critical to understand that the individual accounts exist as a "bookkeeping matter," Br. for the U.S. as *Amicus Curiae* 5, to reflect the allocation of interests in the plan.

2. The plan's assets, situated in individual accounts, must be available for the plan's maintenance and functioning.

The total assets held by the plan are utilized to pay plan benefits and defray the cost of operating the plan. *See* 29 U.S.C. § 1104(a) (requiring fiduciaries to act for the exclusive purpose of providing benefits and paying expenses); 26 U.S.C. § 401(a). For defined contribution plans, these expenses are necessarily paid by the individual accounts that comprise the plan.[11] Costs of operating the plan – typically including items such as investment expenses, recordkeeping fees, and distribution fees – are usually charged to each individual account, on either a pro rata or per capita basis. *See generally* Field Assistance Bulletin No. 2003-3, 2003 WL 24127777 (May 19, 2003) (outlining proper methods of plan

[11] It is theoretically possible for a plan sponsor to pay for all of the plan's expenses. However, in practice at least *some* plan expenses are paid by the individual accounts in every defined contribution plan. Of course, the fact that individual accounts are always at least partly responsible for plan expenses is not the only reason why the plan is more than a legal fiction. Even a defined contribution plan that shifted *no* expenses to the individual accounts would be properly conceived of as a trust, in which the corpus of the trust was comprised of the assets in each individual account. The fact that a trust's assets are held in multiple accounts does not change the nature of the trust itself.

expense allocation). Regardless of the specific method of allocation, each individual account typically supports and maintains the plan of which it is a part.

3. Any recovery under section 502(a)(2) will be a plan asset.

If LaRue prevails upon his 502(a)(2) claim, he will not be immediately entitled to the funds recovered by virtue of winning his claim against the fiduciaries. Instead, any monies awarded will first be restored to the plan. This is clear from the Department's treatment of funds that are similar to the money that LaRue may recover in his lawsuit.

If the fiduciaries are ultimately held to be liable for breach of their duties, then any amounts paid by them that are attributable to the investments elected by LaRue would constitute plan assets. The Department has indicated in several contexts that amounts received as a result of a plan's investments are plan assets. In Field Assistance Bulletin 2006-1, the Department addressed itself to settlement funds that were generated as a result of enforcement activity by the Securities and Exchange Commission ("S.E.C.") against a number of mutual funds. *See generally* Field Assistance Bulletin No. 2006-01, 2006 WL 1223369 (April 19, 2006). Via "independent distribution consultants (IDCs)," the S.E.C. had arranged for distribution of the settlement funds to investors, including direct payments to retirement plans who were the shareholders of record or to intermediaries who provided services to retirement plans, including broker-dealers, underwriters and recordkeepers, where omnibus accounts were used to aggregate the holdings of multiple plans. The settlement restored losses to mutual fund investors that resulted from late trading and market timing. *Id.* at 1. The Department explained that, as soon as the plan or intermediary (where an omnibus account was used) received the settlement proceeds, those proceeds would be consid-

ered plan assets. *Id.* at 3. This would be true even for plans that were terminated by the time the intermediary received the settlement money. *Id.* at 5.[12]

Similarly, in Advisory Opinion 2005-08A, the Department stated that litigation proceeds paid to policyholders of Blue Cross and Blue Shield of Minnesota were plan assets to the extent that the plan was the investor. The plan was considered the investor where plan assets were used to purchase policies. The Department explained:

> Generally, a distribution such as the Payment, will be a plan asset if a plan has a beneficial interest in the distribution under ordinary notions of property rights. . . . *In the case where* any type of plan or trust is the policyholder, or where *the premium is paid entirely out of trust assets, it is the view of the Department that the entire distribution amount received by such policyholder constitutes plan assets.*

Advisory Opinion No. 2005-08A, 2005 WL 1208695 (May 11, 2005) at 3 (emphasis added).

Further, the Department also stated that amounts received by policyholders in the demutualization of an insurance company were plan assets to the extent they were at-

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[12] The Field Assistance Bulletin stated:

> An intermediary may also receive [settlement] proceeds on behalf of plans that have terminated. *In such instances, an intermediary should make reasonable efforts to deliver such assets to a responsible plan fiduciary (most likely, the plan sponsor) for distribution to plan participants or other appropriate disposition.* If the intermediary is unable to locate a responsible plan fiduciary after a reasonable and diligent search, the intermediary may reallocate such proceeds among its other clients. Under no circumstances may an intermediary retain such assets for its own use.

Field Assistance Bulletin No. 2006-1, *supra*, at 5 (emphasis added).

tributable to policies paid for with plan assets. Prudential was making payments of stock, cash or policy credits to its policyholders when it converted from a mutual life insurance company to a stock life insurance company (a process known as demutualization). The Department explained:

> The proceeds of the demutualization will belong to the plan if they would be deemed to be owned by the plan under ordinary notions of property rights. . . . In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, *or where the policy is paid for out of trust assets, it is the view of the Department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets.*

Advisory Opinion No. 2001-02A, 2001 WL 429857 (Feb. 15, 2001) at 2, n.2 (emphasis added).

Thus, any earnings restored to the plan that are attributable to investment directions provided by LaRue will be plan assets.

4. As a plan asset, the recovery will be allocated to LaRue.

After the losses have been restored to the plan, the plan fiduciaries are then responsible for allocating those recoveries. A prudent fiduciary would likely allocate any recovered amounts, less expenses, to LaRue. As the Department has noted:

> in this regard, a plan fiduciary must be prudent in the selection of a method of allocating settlement proceeds among plan participants. Prudence in such instances, at a minimum, would require a process by which the fiduciary chooses a methodology where the proceeds of the settlement would be allocated, where possible, to the affected participants in

> relation to the impact the market timing and late trading activities may have had on the particular account.

Field Assistance Bulletin No. 2006-01, 2006 WL 1223369 (April 19, 2006) at 4. Thus, LaRue is likely to receive the entire recovered amount, less any expenses. For example, LaRue is likely to be charged a distribution fee when the recovered amount is disbursed to him. However, other allocation methods may also be permissible. *See, e.g., id.* ("However, prudence would also require a process by which the fiduciary weighs the costs to the plan or the participant accounts and ultimate benefit to the plan or participants associated with achieving that goal."). Even though no prudent fiduciary could reasonably deny LaRue any recovery, it is significant that LaRue will not receive a guaranteed sum. Such fact confirms that a defined contribution plan's system of disbursement is not simply a "straw transaction," as Respondents contend, Supp. Br. of Resp't in Reply to Br. for U.S. as *Amicus Curiae* 4, but is essential to the functioning of a defined contribution plan.

5. The loss to LaRue's individual account constituted a loss to the plan.

Given the structure of the defined contribution plan – the way in which assets are held, used and allocated, it becomes evident that losses to an individual account may well constitute losses to the plan as a whole. Because the plan's assets are comprised only of the assets of each individual account plan, pecuniary loss to one individual plan component may well cause the plan to have fewer assets. In this way, loss to one account will cause tangible harm to the plan at large. *See* Dana Muir, *ERISA and Investment Issues*, 65 Ohio St. L.J. 199, 235 (2004) ("In [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants'

accounts."). Indeed, the present case is exactly such a situation: LaRue alleges that the plan holds approximately $150,000 less than it would have otherwise held because of fiduciary breaches visited upon his plan account. Br. in Opp'n., App 2a-4a (Complaint). The statutory language of section 502(a)(2) is satisfied when such a loss occurs.

Furthermore, the monies LaRue seeks to recoup are nothing less that the res of the trust itself. By recognizing the mechanics of how a defined contribution plan operates, it is clear that the Fourth Circuit erred in holding that LaRue seeks a recovery that would "solely benefit" himself. Pet. for Writ of Cert., App. A, 6a (citations omitted). LaRue's success will cause the plan to hold greater assets. Thus, his lawsuit is no different than a lawsuit in which all the participants join together to sue for losses to all of their accounts. "Although the number of affected participants differs, the nature of relief - the payment of money to *the plan* – is the same whether the recovery is allocated to the account of one participant, a number of participants, or every participant in the plan." Br. of U.S. as *Amicus Curiae* 9 (emphasis in original).

C. Section 404(c) Of ERISA Confirms That Congress Intended A Loss To An Individual Account To Be Remediable Under Section 502(a)(2).

An analysis of another provision of ERISA – section 404(c) – reveals that Congress anticipated that fiduciaries would be held liable for losses that occur within the confines of only one individual account. Simply put, Congress would not have drafted section 404(c) – a provision that affords protection to fiduciaries from losses that result from a participant's investment decisions – as it did if it did not believe that fiduciaries could be held liable for losses suffered by an individual participant's account. This Court has recognized that it will not interpret statutory language in a way that

renders other language within the statute superfluous. *Hibbs v. Winn*, 542 U.S. 88, 99-101 (2004) (stating that courts are to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 141-42 (1985).

ERISA section 404(a) generally requires fiduciaries to act for the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable plan expenses. 29 U.S.C. § 1104(a)(1)(A). Fiduciaries are held to the standard of a hypothetical prudent person who is knowledgeable about such matters. 29 U.S.C. § 1104(a)(1)(B). Furthermore, fiduciaries are generally required to diversify the plan's investments to minimize the risk of large losses and follow the terms of the plan document as long as they do not conflict with ERISA. 29 U.S.C. § 1104(a)(1)(C) and (D).

However, when a participant directs the investment of his or her own account, ERISA section 404(c) protects fiduciaries from liability for losses that may result. That is, if a participant directs the investment of his or her account and the value of the account is diminished as a result of the participant's investment decision, the fiduciary will not necessarily be liable for the loss. ERISA section 404(c) states:

> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
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> . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1104(c). The regulations articulate a number of conditions that must be satisfied if the fiduciary hopes to be immunized from liability. 29 C.F.R. § 2550.404c-1(a)(2).

A review of these regulations makes clear that a fiduciary may be afforded relief on a transactional basis. 29 C.F.R. § 2550.404c-1. That is, the regulations immunize fiduciaries (who have satisfied the appropriate conditions) for each loss-causing investment transaction that a participant has control over. For example, the regulations include the requirement that participants be given information relative to a particular transaction. In particular, if the investment is subject to the Securities Act of 1933, fiduciaries must, immediately before or after the participant makes the investment, provide the participant with a copy of the most recent prospectus provided to the plan. If a fiduciary fails to provide this information, section 404(c) will not protect the fiduciary from liability for loss caused by the investment decision. But if a fiduciary could not be held liable for losses to the plan that resulted from only one investment transaction, then relief under section 404(c) would be unnecessary. This Court should reject an interpretation of section 502(a)(2) that renders section 404(c) superfluous.

D. *Russell* Recognizes The Type Of Recovery Sought By LaRue.

LaRue is seeking the type of recovery that *Massachusetts Mutual. Life Insurance Co. v. Russell* indicates is available under section 502(a)(2). Br. for U.S. as *Amicus Curiae* 6. In *Russell*, this Court rejected a participant's attempt to use section 502(a)(2) to recover compensatory and punitive damages flowing from her employer welfare plans' delay in providing her the benefits to which she was entitled. Specifically, the participant alleged that "[t]he interruption of benefit payments allegedly forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated

the psychological condition that caused [the participant's] back ailment." *Russell*, 473 U.S. at 137. The participant did not allege that she was denied her full plan benefits, but rather sought recovery for the emotional distress caused by the temporary cessation of those benefits. Thus, the participant sought to recover the unique damages that she had suffered, without regard to any loss that the plan may have experienced. *Id.* at 136. In rejecting her claim for relief under section 502(a)(2), the Court reasoned that the participant was seeking individualized relief, rather than relief for the benefit of the plan as a whole. The Court emphasized that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Id.* at 140-41 n.8. The Court noted that recovery for the plan of losses arising from mismanagement of plan assets "inures to the benefit of the plan as a whole." *Id.* at 140. Thus, a fair reading of *Russell* confirms that nonfeasance or malfeasance affecting plan assets is the touchstone of the statutory requirement of "losses to the plan." 29 U.S.C. §§ 1109, 1132(a)(2).

The Fourth Circuit's summary characterization of the relief sought in this case as individual in nature represents a failure to undertake the proper analysis called for by *Russell*. Unlike the participant in *Russell*, LaRue alleges that the fiduciaries have diminished the total assets of the DeWolff Plan. The fact that the diminution in value of the total assets of the DeWolff Plan happened to take place within the boundaries of LaRue's single account is irrelevant. Nor is it relevant that, if LaRue prevails, it is likely that the plan will allocate the recovery – less plan expenses – to only LaRue's account, rather than the accounts of other individuals. Nothing in *Russell* requires a section 502(a)(2) claim to seek relief that benefits all, or a certain percentage, of plan participants. Rather, a 502(a)(2) claim must benefit the plan as a whole, as LaRue's claim certainly does. See *supra* Part I.B.

II. LaRue's Withdrawal Of Funds From His Account Does Not Warrant Dismissal Of The Writ.

Respondents argue in their motion to dismiss the writ that this case is moot because LaRue withdrew his funds from his account and may therefore no longer bring a claim under either section 502(a)(2) or section 502(a)(3) of ERISA. Respondents' argument relies on a flatly incorrect definition of the term "participant" and also on a misunderstanding of the way in which defined contribution plans function. Not only is LaRue a "participant" within the meaning of both sections 502(a)(2) and (a)(3) of ERISA, it is clear that, if LaRue prevails on one or both of those legal theories of recovery, the money awarded will be returned to the DeWolff Plan and then disbursed to LaRue. An active dispute, capable of being remedied, remains between the parties.

A. Respondents Confuse Mootness With A Challenge To LaRue's Right To Recover Under Section 502(a).

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Where claims in the case remain unresolved and are "hotly contested by clearly adverse parties," a case is not moot. *Id.* at 498 ("Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties.") Moreover, the doctrine of mootness does not permit a litigant to present to the Court every merits-based defense in an attempt to show that the requested claims for relief will fail. That is, mootness should not be "confuse[d with a challenge to the plaintiff's] right to recover. *Id.* at 500. In *Powell*, this Court explicitly rejected an attempt by the respondents to argue

that, since the plaintiff (petitioner) brought suit in the incorrect forum, the case should be dismissed as moot:

> Finally, respondents seem to argue that Powell's proper action to recover salary is a suit in the Court of Claims, so that, having brought the wrong action, a dismissal for mootness is appropriate. The short answer to this argument is that it confuses mootness with whether Powell has established a right to recover against the Sergeant at Arms, a question which it is inappropriate to treat at this stage of the litigation.

Id.

Just as the Court rejected the mootness challenge in *Powell*, it should reject Respondents' mootness challenge in this case. Respondents' assertion that LaRue is no longer a "participant" within the meaning of ERISA is merely an argument that LaRue has no right to recover against Respondents. In the lower courts, Respondents successfully obtained a judgment on the pleadings on the grounds that, even if all of the allegations within LaRue's complaint were taken as true, LaRue could not state a claim under sections 502(a)(2) or (a)(3) because he failed to allege a "loss to the plan" and he was not truly seeking "appropriate equitable relief." By bringing the "new" fact of LaRue's withdrawal of funds to this Court's attention, Respondents have simply taken an argument about why they believe ERISA affords LaRue no relief and labeled it a mootness challenge. This contention is no different than if Respondents had recently discovered that LaRue's investment instructions had in fact been followed, such that there was no "breach[of] any of the responsibilities, obligations, or duties imposed upon fiduciaries" within the meaning of section 409 of ERISA. To give Respondents' contention that LaRue is not a "participant" within the meaning of section 502(a) more than passing attention would impermissibly enlarge the doctrine of moot-

ness so that it requires the Court to adjudicate all merits-based defenses before satisfying itself that a case is not moot.

Respondents' contention – that LaRue's withdrawal from the plan constitutes an intervening event that proves that LaRue is no longer a participant and hence no longer entitled to maintain an action under section 502(a)(2) or (a)(3) – contrasts sharply with the kind of argument that would deserve this Court's attention. Suppose that LaRue's counsel had written a letter to Respondents' counsel last week, conceding that LaRue was no longer entitled to maintain an action under section 502(a)(2) or (a)(3) but refusing to voluntarily dismiss the case. Respondents could bring such an intervening event to this Court's attention and request dismissal of the writ as moot. But as long as this Court satisfies itself that the parties are contesting the issue of whether LaRue can maintain an action under section 502(a) – which they certainly are – this Court need not concern itself with the various arguments that constitute that dispute. Instead, it can and should focus its attention on the important legal issues that are squarely presented in this case.

B. Once The Mootness Label Is Removed, Respondents' Argument Is Revealed To Be A Procedurally Improper One.

Respondents likely characterized their argument as a mootness challenge because a cursory review of the procedural posture of this case makes abundantly clear that their argument cannot be considered at this time. This case was dismissed on a motion for judgment on the pleadings, so this Court must take as true LaRue's allegation that he is a participant. If Respondents wish to challenge LaRue's status, they must do so on remand in a motion for summary judgment.

The district court dismissed LaRue's complaint pursuant to a Rule 12(c) motion for judgment on the pleadings. Pet. for Cert., App. 15a-16a. It is beyond dispute that, in adjudicating a motion for judgment on the pleadings, all facts alleged in the pleadings must be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The complaint properly alleged that LaRue was a participant. Br. in Opp'n., App. 2a. The complaint nowhere alleged any facts concerning LaRue's withdrawal of any funds from his account. Indeed, it could not have done so, as LaRue withdrew his funds in July of 2006, two years after his complaint had been filed (on June 2, 2004) and well after the district court had entered judgment dismissing the case. For the same reason, and even more importantly, the Respondents did not challenge in their motion for judgment on the pleadings that LaRue was a participant. As such, this Court is required to take as true the fact that LaRue is a participant in the DeWolff plan.

Respondents' attempt to invoke recently discovered facts in support of dismissal is no different than if they recently unearthed evidence that the fiduciaries followed LaRue's investment instructions. Respondents would not be permitted to raise such an argument before this Court simply by asserting that a new legal issue has presented itself. *See* Mot. to Dismiss 2,7. Instead, Respondents would be required to present such evidence on remand in a Rule 56 motion for summary judgment, because they would be seeking to introduce materials outside of the pleadings.

Once this Court has resolved the preliminary legal question of whether LaRue is seeking the type of recovery that is remediable under either section 502(a)(2) or (a)(3), the Respondents will be free on remand to challenge LaRue's status as a participant within the meaning of ERISA. They will undoubtedly present other, similar challenges to the allegations in LaRue's complaint, such as whether their failure

to follow his investment instructions constituted a breach of fiduciary duty, or whether their alleged breach of duty caused the diminution in value of assets of $150,000. It should not concern this Court that Respondents will make such arguments; nor should it concern this Court that Respondents might successfully obtain judgment as a matter of law. An eventual defeat for LaRue does not undermine the propriety and importance of the resolution of the questions that are squarely presented by this case.

C. This Court Need Not Treat The Issue Of Whether LaRue Is A "Participant" As A Threshold Question.

In addition to arguing that the case should be dismissed as moot, Respondents urge this Court to dismiss the writ as improvidently granted because a new legal issue has presented itself that is "logically antecedent to the issues on which this Court granted certiorari." Mot. to Dismiss 7. As explained in *supra* Part II.B., the procedural posture of this case bars such an argument by Respondents. But Respondent are also mistaken in their belief that the issue of whether LaRue is a participant necessarily precedes the questions presented in this case. Neither question presented requires this Court to first determine whether LaRue is a participant. The section 502(a)(2) question turns on whether a diminution in value of the total assets of a defined contribution plan that results from the breach of fiduciary duty towards only one particular participant is nevertheless a loss to the plan as a whole. This question does not require the Court to determine whether a person who has withdrawn his or her funds from the defined contribution plan is a participant. Nor is that issue relevant to the section 502(a)(3) question, which turns on this Court's interpretation of the term "appropriate equitable relief." Moreover, although Respondents cite a few cases that suggest that LaRue lacks standing to assert his claims, there can be no

doubt that LaRue satisfies all of the requirements of constitutional standing. Despite some references by Respondents to "statutory standing," whether LaRue is a "participant" is simply a defense on the merits of his section 502(a) claims. *Harzewski v. Guidant Corp.*, No. 06-3752, 2007 WL 1598097 at 3 (7th Cir. June 5, 2007) ("Except in extreme cases . . . the question whether an ERISA plaintiff is a 'participant' entitled to recover benefits under the Act should be treated as a question of statutory interpretation fundamental to the merits of the suit rather than as a question of the plaintiff's right to bring the suit."). As such, this Court need not treat the issue of whether LaRue is a participant as a threshold inquiry.

D. LaRue Is A "Participant" Because He Has A Colorable Claim That He Will Prevail In A Suit For Benefits.

Should this Court disagree with the reasons articulated above for ignoring Respondents' argument that LaRue is not a participant, it can easily conclude LaRue is currently a participant within the meaning of section 502. Respondents label LaRue a "former plan participant," Mot. to Dismiss 3, but no such term exists in ERISA. To the contrary, it is clear that the term "participant" may include even individuals who no longer hold accounts in defined contribution plans. The term "participant" includes "former employees who . . . have a colorable claim to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). Thus, participants who received distributions of their account balances from a defined contribution plan may still be participants if they have a colorable claim to additional benefits under the plan. ERISA defines the term "participant" as:

> *any* employee or *former employee* of an employer, or any member or former member of an employee organization, *who* is or *may become eligible to re-*

> *ceive a benefit of any type from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis added). As this Court held in *Firestone*, participants include former employees who are reasonably expected to have benefits under an employee benefit plan:

> In our view, *the term "participant" is naturally read to mean* either "employees in, or reasonably expected to be in, currently covered employment,". . . or *former employees* who "have . . . a reasonable expectation of returning to covered employment" or *who have "a colorable claim" to vested benefits*. . . . In order to establish that he or she "may become eligible" for benefits, *a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits*, or that (2) eligibility requirements will be fulfilled in the future.

489 U.S. at 117-18 (citations omitted; emphasis added). In *Firestone*, former employees of Firestone sought damages for Firestone's failure to provide them with information regarding their benefits under three different employee benefit plans. *Id.* at 106. The former employees had requested the information from Firestone (which was the administrator and fiduciary) pursuant to ERISA's disclosure provisions, but they had made their requests after Firestone had already sold its Plastics Division to Occidental Petroleum Company. *Id.* at 105-106. As a result, Firestone took the position that the former employees were not "participants" in the plans when they made their requests and thus were not entitled to receive the information they had requested. *Id.* at 106. The district court granted summary judgment in favor of Firestone because, *inter alia*, it agreed with Firestone's position that the former employees were not "par-

ticipants" (or "beneficiaries") when they requested the information from Firestone. The Court of Appeals reversed and this Court affirmed. After articulating its interpretation of the definition of the term "participant," the Court remanded the case for further proceedings to determine whether the former employees were in fact "'participants' with respect to the benefit plans about which they sought information." *Id.* at 118.

Just as the former employees in Firestone had a colorable claim to "benefits," (the benefits in that case being the disclosure of information) LaRue is a former employee who has a colorable claim that he will prevail in litigation to obtain benefits – the money that would have been earned had LaRue's investment instructions been followed. In a defined contribution plan, "an employee's retirement benefit is the eventual value of his or her account to which contributions have been made by the employer and / or the employee." *West v. AK Steel Corp.*, 484 F.3d 395, 398-99 (6th Cir. 2007); 29 U.S.C. § 1002(34). "[T]he benefits themselves are not specified; they are just whatever is in the account when it is cashed out, provided the formula is properly applied." *Harzewski*, 2007 WL 1598097 at 4. If those benefits are miscalculated and then disbursed to the employee, there is no doubt that the employee can sue to recover the correct amount. *Id.* at 3. Similarly, if the fiduciary "had stolen half the money in a plan participant's retirement account and a suit by the participant resulted in a judgment for that account; the suit would have established the retiree's eligibility for a larger benefit." *Id.* The result is exactly the same if some other breach of duty by the fiduciary causes a decrease in the value of the account. "The benefit in a defined-contribution pension plan is, to repeat, just whatever is in the retirement account when the employee retires or *whatever would have been there had the plan honored the employee's entitlement, which includes an entitlement to pru-*

dent management." *Id.* at 4 (emphasis in original). Although he received a partial distribution of his benefits, LaRue alleges that his benefits would have been greater had the fiduciaries honored their obligation to follow his investment directions. *See* 29 U.S.C. § 1104(a)(1) (requiring plan fiduciaries to abide by the defined contribution plan document); Br. in Opp'n, App. 19a (Summary Plan Description of the DeWolff Plan, attached to Complaint) ("You will be able to direct the investment of your entire interest in the Plan."). Thus, his "benefits" are not simply what existed in his account when he withdrew his funds, but rather what would have been in his account had the fiduciaries not breached their duties.[13] As a result, upon the restoration of losses to the Plan and subsequent allocation of some or all of these losses to his account, LaRue will have additional benefits under the plan. This would be true regardless of whether his account balance were $119,009.13 or zero. *Harzeweski*, 2007 WL 1598097 at 3-4 (holding that former employees who have cashed out of defined contribution plan are "participants"). Because LaRue has a colorable claim that he is entitled to additional benefits, he is a "participant" within the meaning of section 502.

E. Both The Plan And LaRue Will Benefit If LaRue Prevails In His Lawsuit.

In addition to inaccurately characterizing LaRue as a "former plan participant" rather than a "participant," Respondents also assert that LaRue "has no personal stake in whether or not the Plan receives a benefit" because "any

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[13] In addition to breaching their duty to follow the plan document, the fiduciaries breached their duty of act for the exclusive purpose of participants and beneficiaries and did not satisfy the prudent person standard in ERISA section 404(a) when they failed to follow LaRue's investment instructions. 29 U.S.C. 1104(a)(1).

recovery achieved by the Plan would not benefit the Petitioner, because it could only go to the Plan." Mot. to Dismiss 4. Respondents assert that the only way in which LaRue can benefit is if payment of damages is made directly to him. Respondents are wrong. Even though LaRue seeks recovery for the Plan under 502(a)(2) and (a)(3), he will ultimately receive some or all of the monies awarded as a result of his lawsuit. As explained in *supra* Part I.B.3, if LaRue prevails in this lawsuit, the losses will first be restored to the Plan. However, once the lost earnings are paid to the plan, the fiduciaries have the responsibility to prudently allocate these amounts. *See supra* Part I.B.4. Thus, if LaRue prevails in his suit, the recovery will be paid to the DeWolff Plan and subsequently allocated in whole or in part to an account established for LaRue in the Plan.

That LaRue has withdrawn funds from his account in the DeWolff Plan has no bearing on such an allocation. Even if a plan is terminated, fiduciaries are required to distribute proceeds to plan participants. As the Department has explained:

> An intermediary may also receive proceeds *on behalf of plans that have terminated.* In such instances, an intermediary should make reasonable efforts to *deliver such assets to a responsible plan fiduciary (most likely, the plan sponsor) for distribution to plan participants* or other appropriate disposition. If the intermediary is unable to locate a responsible plan fiduciary after a reasonable and diligent search, the intermediary may reallocate such proceeds among its other clients. Under no circumstances may an intermediary retain such assets for its own use.

Field Assistance Bulletin No. 2006-01, 2006 WL 1223369 (April 19, 2006) at 5. If fiduciaries must distribute settlement proceeds in even the situation of a terminated plan,

there can be no doubt that fiduciaries are required to distribute litigation funds to a person who has withdrawn the undisputed portion of his funds from the plan. Accordingly, LaRue continues to have a personal stake in this lawsuit.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted.

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AUGUST 7, 2007

No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND

DEWOLFF, BOBERG & ASSOCIATES, INC. EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. Many of these plans are "401(k) plans" that allow eligible employees to elect whether to participate, how much to contribute, and how their accounts should be allocated among the plan's investment options.

ERIC frequently participates as *amicus curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[2] This is such a case.

Petitioner has illegitimately recast a claim for plan benefits as a claim for breach of fiduciary duty. A participant in an employee benefit plan is permitted to file a civil action to enforce a benefits claim under § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"):

> A civil action may be brought – (1) by a participant or beneficiary – ... (B) to recover benefits due to him under the

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g., General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987).

> terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a). Because petitioner seeks "to recover benefits due to him under the terms of his plan," "to enforce his rights under the terms of the plan," and "to clarify his rights to future benefits under the terms of the plan," his claim falls within the scope of § 502(a)(1)(B).

Many plan participants and beneficiaries, with claims similar or analogous to petitioner's claim, have filed civil actions under § 502(a)(1)(B) to enforce their claims. Where a claimant has established that he or she has not received the benefits or been afforded the rights to which the claimant was entitled under the terms of the plan, courts have awarded relief, including monetary relief, to make up for the plan's failure to provide the benefits or rights to which the claimant was entitled under the terms of the plan.

This reality belies any claim that an amendment to ERISA is needed to authorize courts to grant the kind of relief petitioner that seeks here. Such relief would have been available if petitioner had proven his case under § 502(a)(1)(B). Petitioner's decision to embark on a different path – *not* the path charted by Congress in ERISA and followed by countless individuals – does not alter what § 502(a)(1)(B) provides.

Moreover, if petitioner's new path is available to participants and beneficiaries with claims for benefits under the terms of a plan, those individuals can easily circumvent the procedures that ERISA prescribes for benefit claims simply by recasting their benefit claims as fiduciary breach claims. This will cause employee benefit litigation and litigation costs to escalate even more than they already have.

Additional litigation over benefit claims arising under employee benefit plans would harm employers and employees by discouraging the formation of new plans, encouraging the termination of existing plans and, for the plans that remain, requiring the allocation of a greater percentage of plan resources to legal fees and costs rather than to providing benefits.

Because of the importance of the issues presented by this case, ERIC respectfully urges the Court to affirm the decision below and make clear that a plan participant cannot file an action to recover benefits under § 502(a)(2) or (3) of ERISA merely by recasting a benefit claim as a fiduciary breach claim.

STATEMENT

Petitioner participated in an ERISA-governed 401(k) plan (the "DeWolff Plan" or the "Plan") sponsored by his employer, DeWolff, Boberg & Associates, Inc. ("DeWolff"). The Plan designated DeWolff as the administrator of the Plan (the "Administrator").[3]

The Plan allowed each eligible employee to elect to forgo receiving a percentage of compensation and to have an amount equal to the forgone compensation contributed to the Plan for the employee's benefit. In addition, the Plan stated that each year DeWolff would make a "qualified non-elective contribution" equal to a percentage of compensation to be determined by DeWolff and might also make a discretionary profit-sharing contribution. Br. in Opp. App. 10a, 12a-18a.

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[3] Although petitioner's complaint stated that the Plan document was attached to his complaint, only a copy of the summary plan description ("SPD") was attached. *See* Br. in Opp. App. 2a, 6a-42a. For purposes of ruling on respondents' motion for judgment on the pleadings, the courts below accepted petitioner's allegations as pled. Pet. App. 2a-3a, 15a-16a. Accordingly, this description of the Plan is based solely on the allegations in the complaint and the SPD.

The Plan provided that each participant's benefits would be based on the participant's vested interest in the balance in an account maintained for the participant, that amounts equal to the contributions made by or for each participant would be added to that account, and that the participant's account balance would be adjusted to reflect the investment returns on the amounts attributable to those contributions. Br. in Opp. App. 13a, 14a, 17a, 19a. The Plan provided that a participant's interest in the portion of the account attributable to DeWolff's profit-sharing contributions would vest on a graduated schedule. Br. in Opp. App. 21a.

The Plan stated that each participant could direct the investment of the participant's interest in the Plan, that the Administrator would inform the participant of the available investment choices, the frequency with which a participant could change investments, and other matters. The Plan also stated that to the extent that the participant did not direct investments, the Trustee or another designated person would be responsible for making investment decisions. Br. in Opp. App. 19a.

The Plan included a benefit claim procedure that allowed a participant to submit a claim for benefits under the Plan. The Plan stated that if a claim for benefits was denied in whole or in part, the Administrator would explain the reasons for the denial in writing, and that if the participant wanted the denial of a claim to be reviewed, the participant had to submit a written request for review to the Administrator within 60 days after the claim was denied. The Plan provided that if the claim was denied upon review, the participant could file suit in state or federal court. Br. in Opp. App. 37a-40a.

Without exercising his rights under the Plan's benefit claim procedure, petitioner filed a complaint against DeWolff and the Plan on June 2, 2004, in the U.S. District Court for the District of South Carolina. He alleged that, in 2001 and 2002, he directed that "his

money" be invested in a certain way, but that the Plan did not follow his direction, and that as a result his interest in the Plan was depleted by about $150,000. He alleged that DeWolff was a Plan fiduciary responsible for the Plan's operations and that it had breached its fiduciary duties under § 404 of ERISA. Petitioner asked the court to grant him "make whole" or other equitable relief under § 502(a)(3) of ERISA. Br. in Opp. App. 1a-4a.[4]

Petitioner did not allege that the persons responsible for investing Plan assets had breached ERISA's fiduciary duties in any way other than by failing to invest "his money" in accordance with his directions. He did not allege that the fiduciaries had made misrepresentations to Plan participants or otherwise acted disloyally, that Plan assets had been invested imprudently, that the Plan's investments had not been diversified, that the fiduciaries had engaged in self-dealing or directed transactions that ERISA prohibits, or that the Plan's investments violated any provision of the Plan other than the participant-direction requirement. *See* ERISA §§ 404-408, 29 U.S.C. §§ 1104-1108. Petitioner asked the district court to grant "make whole" relief to *him*, rather than to the Plan or to other Plan participants. Br. in Opp. App. 1a-4a.

The district court granted respondents' motion for judgment on the pleadings and dismissed the case on the ground that § 502(a)(3) did not authorize the relief petitioner seeks. The Court of Appeals for the Fourth Circuit affirmed the district court's decision on the ground that neither § 502(a)(2) nor § 502(a)(3) authorizes such relief.

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[4] During proceedings in the court of appeals, petitioner also asserted that he was entitled to relief under § 502(a)(2).

SUMMARY OF ARGUMENT

Although the questions presented in this case refer to ERISA's second and third civil enforcement provisions (ERISA § 502(a)(2) & (3), 29 U.S.C. § 1132(a)(2) & (3)), the scope of the second and third provisions depends on the scope of the first civil enforcement provision, ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1). Section 502(a)(1) authorizes a plan participant or beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Section 502(a)(1) "was specifically enacted by Congress to permit the recovery of plan benefits by a participant or beneficiary." Pet. Br. at 25 n.17. Petitioner chose not to make a claim under § 502(a)(1), however, and instead based his claim entirely on § 502(a)(2) and (3). Petitioner has not explained why he did not make a claim under § 502(a)(1). He has asserted only that § 502(a)(1) "is not involved in this case." Pet. at 5 n.11.

Contrary to petitioner's assertion, § 502(a)(1) *is* involved in this case. Section 502(a)(1) authorizes a participant to bring an action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. That is precisely what petitioner seeks: to recover benefits he believes are due to him under the terms of the Plan, to enforce his rights under the terms of the Plan, and to clarify his rights to future benefits under the terms of the Plan. An amendment to ERISA is thus not needed to authorize the kind of relief that petitioner seeks here.

Petitioner claims that, contrary to the terms of the Plan, the Plan did not base the amount of his benefit on the performance of the investments he specified in his investment directions. His complaint recognizes that the

terms of the Plan gave him the right to issue such directions. ERISA did not give him that right. Petitioner does not allege that the Plan's fiduciaries violated their fiduciary duties regarding the investment of the Plan's assets in any way other than by failing to follow his directions. His complaint addresses neither the prudence of the fiduciaries' decision-making process nor the prudence of their investment decisions. He does not allege that the fiduciaries made misrepresentations regarding the Plan's terms. Petitioner seeks relief only for himself. He does not seek relief either for other participants or for the Plan as an entity. In fact, he named the Plan as a *defendant*.

Section 502(a)(2) and (3) offer relief only if relief under those provisions is "appropriate." The Court has emphasized that because § 502(a)(3) authorizes only "appropriate" relief, § 502(a)(3) does not normally provide relief if another provision of ERISA, such as § 502(a)(1), provides an adequate remedy. *Varity Corp* v. *Howe*, 516 U.S. 489, 515 (1996). Likewise, because § 502(a)(2) authorizes only "appropriate" relief, and provides relief only to the plan itself, § 502(a)(2) does not apply to benefit claims that fall within the scope of § 502(a)(1). The courts long ago concluded that participants cannot circumvent § 502(a)(1) by recasting benefit claims as fiduciary breach claims.

If plan participants were allowed to recast benefit claims as fiduciary breach claims, participants could easily circumvent the claim procedures, the exhaustion requirement, and the abuse of discretion standard of review that apply to most benefit claims under ERISA.

ERISA's benefit claim and exhaustion requirements foster efficient and nonadversarial dispute resolution and consistent decision-making by experienced and knowledgeable plan administrators. They reduce the need for litigation and develop a record that a court can review in the event there is litigation. The abuse of discretion

standard of review assures the employer that a benefit plan will be administered consistently and in accordance with the employer's purpose in establishing the plan.

There is a high risk of serious damage to employee benefit plans, employees, and their families if benefits claimants are allowed to opt out of the benefit claim procedure, the exhaustion requirement, and the abuse of discretion standard of review. Plans will suffer financially under the burden of mounting litigation costs – necessitating reductions in benefits, increases in required employee contributions, or both, and employer interest in sponsoring employee benefit plans will decline.

ARGUMENT

I. ERISA's Interlocking, Interrelated And Interdependent Remedial Provisions Encourage Employers To Establish Employee Benefit Plans And Require Such Plans To Establish Prompt, Fair, And Effective Benefit Claim Procedures.

In enacting ERISA, Congress sought to encourage employers to maintain employee benefit plans and to ensure that plan participants would receive the benefits that their plans were intended to provide. ERISA's remedial provisions in particular were designed to ensure that benefit commitments expressed in the terms of employee benefit plans would be honored, but to avoid imposing obligations that would discourage employers from adopting such plans. *See Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985).

Voluntary Regime. ERISA was designed to encourage and protect "the establishment, operation, and administration" of employee benefit plans by setting "minimum standards . . . assuring the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). ERISA does not require

employers to establish employee benefit plans, nor does it specify the benefits that such plans must provide. *See Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("[P]rivate parties, not the Government, control the level of benefits.").

Flexibility. Recognizing that the freedom to adopt and design their own pension plans was "vital" to the willingness of employers to provide such plans, Congress preserved "flexibility in the design and operation of . . . pension programs." H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647. ERISA imposes "outer bounds" on permissible pension practices, but it does not "impos[e] mandatory pension levels or methods for calculating benefits." *Alessi*, 451 U.S. at 512.

Documentation. ERISA requires each benefit plan to be maintained pursuant to a written instrument that, among other things, "specif[ies] the basis on which payments are made to and from the plan" and requires the plan administrator to make the plan's written instrument available for examination and to distribute a summary of the plan as well. ERISA § 401(a) & (b)(4), 29 U.S.C. § 1101(a) & (b)(4); *see* ERISA §§ 101(a), 102(a), 104(b)(1), (2) & (4), 29 U.S.C. §§ 1021(a), 1022(a), 1024(b)(1), (2) & (4). Compliance with these requirements enables participants to learn what benefits their plans provide and how to obtain them. The plan documents also provide guidance to plan administrators. *See Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 82 (1995).

Interlocking, Interrelated Remedy Provisions. ERISA's "comprehensive legislative scheme" includes "an integrated system of procedures for enforcement." *Russell*, 473 U.S. at 147 (citation omitted) (internal quotation marks omitted). Set forth in ERISA § 502(a), 29 U.S.C. § 1132(a), this integrated enforcement scheme is essential to accomplish Congress's purpose of

comprehensively regulating employee benefit plans. The Court has recognized

> one example of . . . overpowering federal policy in [ERISA's] civil enforcement provisions. 29 U.S.C. § 1132(a), authorizing civil actions for six [now nine] specific types of relief. In [*Russell*, 473 U.S. at 147], we said that these provisions amounted to "an interlocking, interrelated, and interdependent remedial scheme," which *Pilot Life* [*Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)] described as "represent[ing] a careful balancing of the need for prompt and fair settlement procedures against the public interest in encouraging the formation of employee benefit plans."

Rush Prudential HMO, Inc. v. *Moran*, 536 U.S. 355, 376 (2002).

Procedural Safeguards. ERISA requires each plan to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." ERISA § 503(2), 29 U.S.C. § 1133(2). The Labor Department regulation implementing § 503 strives to reconcile "the need for procedural protections with the purely voluntary nature of the system through which these vital benefits are delivered." 65 Fed. Reg. 70,246, 70,246 (Nov. 21, 2000). The regulation requires a designated plan fiduciary to review benefit claims and safeguards to ensure that benefit claims are resolved promptly, fairly, consistently, and in accordance with the terms and objectives of the plan, without imposing excessive costs on the plan, the plan's participants and beneficiaries, and the sponsoring employer. *Id.* at 70,246, 70,250, 70,253, 70,256-57; 29 C.F.R. § 2560.503-1 (2007). ERISA's benefit claim procedures have been very

successful in resolving the vast majority of benefit claims without litigation. 65 Fed. Reg. at 70,263, tbl. 4, ll. 1-6.

II. Participants In A Defined Contribution Plan May Direct Plan Investments Only If The Terms Of The Plan Permit Them To Do So.

Defined Contribution Plans. ERISA recognizes two basic types of retirement plans: "defined contribution plans" and "defined benefit plans." ERISA §§ 3(34)-(35), 29 U.S.C. §§ 1002(34)-(35); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999).

The DeWolff Plan was a defined contribution plan. Under a defined contribution plan, each participant's benefit is based solely on the balance recorded in a bookkeeping account that the plan maintains for that participant. The participant's account balance is based on (1) the amount of any employer and employee contributions that are allocated to the account, (2) the amount of any changes in the value of the plan's investments (*i.e.*, income, expenses, gains, and losses) to which the participant's account balance is allocated, and (3) any amounts forfeited by other participants and reallocated to the participant's account. ERISA, § 3(34), 29 U.S.C. § 1002(34). A participant's account balance thus reflects any decline in the total value of the investments to which the participant's account balance is allocated. *See Montgomery* v. *United States*, 18 F.3d 500, 501-02 (7th Cir. 1994).[5]

Managing Plan Assets. Typically, all of the assets of a defined contribution plan are held in a single trust, and the trustee is the legal owner of the plan's assets. Participants' account balances are bookkeeping entries

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[5] ERISA classifies all retirement plans other than defined contribution plans as defined benefit plans. *See* ERISA § 3(35), 29 U.S.C. § 1002(35).

that reflect the participants' beneficial interests in the trust, rather than ownership interests in trust assets.

Participant-Directed Plans. Many defined contribution plans allow individual participants to allocate their account balances to one or more investments that are listed on a menu of investment options that the plan presents. (Some plans give participants the right to designate investments that are not listed on the menu.) Under such plans, the plan's investment experience does not affect all participants' benefits uniformly. The effect of an investment's performance on a participant's account balance depends on the participant's investment allocation decisions. *See, e.g., Jenkins* v. *Yager*, 444 F.3d 916, 919-23 (7th Cir. 2006).

ERISA does not require a defined contribution plan to give participants the right to direct the allocation of their accounts. In general, ERISA provides that the plan's trustee is responsible for managing the plan's assets except to the extent that the plan provides that the trustee is subject to the direction of an investment manager or a named fiduciary. ERISA §§ 402(a) & (c), 403(a), 29 U.S.C. §§ 1102(a) & (c), 1103(a). The party responsible for managing the assets is required to do so in accordance with ERISA's standards of fiduciary responsibility, including the duty of loyalty, the duty of prudence, and the obligation to avoid violations of ERISA's prohibited transaction provisions. ERISA §§ 3(21)(A), 404-408, 29 U.S.C. §§ 1002(21)(A), 1104-08; *see Jenkins*, 444 F.3d at 923-24.

Any rights that participants have to allocate their account balances among investments are conferred by the terms of the plan, not by ERISA. *See id.* at 923-24.[6]

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[6] The Pension Protection Act of 2006 amended ERISA to provide that, beginning in 2007, certain defined contribution plans that invest in employer securities must allow certain participants to direct the plan to divest any employer securities allocated to their accounts and to

Although § 404(c) of ERISA, 29 U.S.C. § 1104(c), can limit fiduciary liability under a participant-directed plan, § 404(c) does not give plan participants the right to issue investment directions. Section 404(c) provides only that if certain conditions are met, the participant's exercise of investment control will not cause the participant to be treated as a fiduciary, and no person who is otherwise a fiduciary will be liable for any loss, or by reason of any breach, caused by the participant's exercise of investment control. One of those conditions is that, "*[u]nder the terms of the plan*, the participant has a reasonable opportunity to give investment instructions . . . to an identified plan fiduciary who is obligated to comply with such instructions." 29 C.F.R. § 2550.404c-1(b)(2)(A) (2007) (emphasis added); *see id.* § 2550.404c-1(a)(2); 57 Fed. Reg. 46,906, 46,907 (Oct. 13, 1992).

III. Because Petitioner Could Have Brought This Suit Under § 502(a)(1)(B), He Is Not Entitled To Bring It Under § 502(a)(2) Or (3).

A. A Participant May Sue Under § 502(a)(2) Or (3) Only For Appropriate Relief For Injuries That Are Not Adequately Remedied By Other ERISA Provisions.

In *Varity*, 516 U.S. at 512, the Court observed that § 502(a)(3) is a "catchall" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." The Court emphasized:

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reinvest the proceeds in another investment. Pub. L. No. 109-280, § 901(b) & (c), 120 Stat. 780, 782 (2006), creating ERISA § 204(j), 29 U.S.C. § 1054(j). There is no suggestion in the record that the DeWolff Plan invested in employer securities. In any event, this case concerns events alleged to have occurred in 2001 and 2002, before ERISA § 204(j) became effective.

> [T]he statute authorizes "*appropriate*" equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that *where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."*

Id. at 515 (emphasis added) (citations omitted).

Consistent with *Varity*, the circuit courts have uniformly held that a participant may not assert a claim under § 502(a)(3) when the participant can obtain adequate relief by asserting a claim for benefits under § 502(a)(1)(B). *See, e.g.*, *LaRocca* v. *Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) ("[F]ederal courts have uniformly concluded that, if a plaintiff can pursue benefits under the plan pursuant to Section [502(a)(1)], there is an adequate remedy under the plan which bars a further remedy under Section [502(a)(3)]."). [7]

Section 502(a)(2) provides for "*appropriate* relief" under § 409 – just as § 502(a)(3) provides for "*appropriate* equitable relief." There are good reasons to believe that Congress intended "appropriate" to have the same

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[7] *See also Johnson* v. *Buckley*, 356 F.3d 1067, 1077-78 (9th Cir. 2004) (§ 502(a)(3) claim is not appropriate where plaintiff can assert a § 502(a)(1)(B) claim); *Rhorer* v. *Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999) (same); *Wald* v. *Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (same).

meaning in both § 502(a)(2) and § 502(a)(3). The two provisions are in adjacent paragraphs of the same subsection of the same statute. *See Barnhill* v. *Johnson*, 503 U.S. 393, 406 (1992) ("Normally, we assume that the same terms have the same meaning in different sections of the same statute."). Thus, Congress presumably intended "appropriate relief" in § 502(a)(2) to have the same meaning as "appropriate . . . relief" in § 502(a)(3).

More importantly, in addressing the type of relief that would normally not be "appropriate" under § 502(a)(3), the Court in *Varity* referred to the views expressed in *Russell* regarding the relief available under § 502(a)(2). *Russell* stated that § 502(a)(1)(B) – rather than § 502(a)(2) – authorizes individual beneficiaries to enforce their rights under the plan, that § 502(a)(2) is concerned with providing relief to the plan itself, and that the Court was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 144, 147.

Consistent with *Varity* and *Russell*, the lower courts have repeatedly held that benefit claim actions must be brought under § 502(a)(1)(B) and cannot be brought under § 502(a)(2) by recasting or repackaging the benefit claim as a fiduciary breach claim; otherwise, any benefit claim could be recast as a fiduciary breach claim and enforced under § 502(a)(2). *See, e.g., Drinkwater* v. *Metropolitan Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988) (stating that plaintiff's claim is a benefit claim "artfully dressed in statutory clothing" and that if claimants were allowed to play the "characterization game, then the exhaustion requirement would be rendered meaningless"); *Coyne & Delaney Co.* v. *Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 714 (4th Cir. 1996) ("To permit" a suit seeking medical benefits "to proceed as a breach of fiduciary duty action would encourage parties to avoid the implications of section 502(a)(1)(B) by artful pleading; indeed every wrongful denial of benefits could be characterized as a breach of

fiduciary duty under [this] theory."); *Crummett* v. *Metropolitan Life Ins. Co.*, No. 06-01450(HHK), 2007 U.S. Dist. LEXIS 50956, at *4-*9 (D.D.C. July 16, 2007) (citing cases); John H. Langbein et al., Pension and Employee Benefit Law 756 (4th ed. 2006) ("Plaintiffs sometimes try to recast benefit denial claims as fiduciary claims in order to avoid exhaustion, and courts have been vigilant in not allowing such artful pleading.").

In *Smith* v. *Sydnor*, 184 F.3d 356 (4th Cir. 1999), the Fourth Circuit emphasized that claims based on the terms of *the plan* are subject to § 502(a)(1)(B), while claims based on the terms of *ERISA* are not:

> *Simmons* [v. *Willcox*, 911 F.2d 1077, 1081 (5th Cir. 1990)], *Drinkwater*, and *Coyne & Delaney* instruct us that a claim for breach of fiduciary duty is actually a claim for benefits where the resolution of the claim turns on an interpretation and application of *an ERISA-regulated plan* rather than upon an interpretation and application of *ERISA*.

Sydnor, 184 F.3d at 362-63.

Here, petitioner alleges a loss of benefits based on a claim that turns on the application and interpretation of the terms of the Plan, rather than ERISA. He claims that, contrary to the Plan's terms, the amount of his benefit under the Plan was not based on the performance of the investments he specified in the directions he gave in accordance with the Plan's terms. His complaint addresses neither the prudence of the Plan fiduciaries' investment decision-making process nor whether their investment decisions were prudent. It focuses solely on how his benefit under the Plan was determined. Petitioner's complaint thus makes a claim for Plan-based benefits that is actionable *solely* under § 502(a)(1)(B).

If plan participants could recast benefit claims as fiduciary breach claims, they could easily circumvent the procedures that Congress designed for benefit claims and thereby undermine Congress's efforts in ERISA to encourage employers to sponsor employee benefit plans and to ensure that participants receive the benefits that the plan is intended to provide.

Dicta in two circuit court decisions can be read to suggest that where a participant in a defined contribution plan alleges fiduciary mismanagement of plan assets, the participant can sue for relief under both § 502(a)(1)(B) and § 502(a)(2). *See Graden* v. *Conexant Sys. Inc.*, No. 06-2337, 2007 U.S. App. LEXIS 18179, at *8-9 (3d Cir. July 31, 2007); *Harzewski* v. *Guidant Corp.*, 489 F.3d 799, 804-07 (7th Cir. 2007). The opinions in these cases suggest that the terms of the plan should be deemed to incorporate ERISA and that therefore a suit alleging breach of fiduciary duty can be brought under § 502(a)(1)(B). In neither case, however, did the plaintiffs sue under § 502(a)(1)(B), and neither court decided that plaintiffs could do so. In any event, that issue is not presented by this case, and the Court need not address it.

If the Court were to address this issue, however, it should reject the view that ERISA can be regarded as one of the terms of a plan for purposes of § 502(a)(1)(B). Treating ERISA as a term of the plan would be inconsistent with the distinctions that Congress carefully drew in the text of § 502(a), which refers to "the terms of the plan" in § 502(a)(1)(B), but to "this title" (Title I of ERISA) in § 502(a)(3) and § 502(a)(5) and to "section 409" in § 502(a)(2).

Moreover, treating ERISA as a term of the plan would be inconsistent with Congress's objective of giving federal courts *exclusive jurisdiction* over the construction and application of ERISA. ERISA vests state and federal courts with concurrent jurisdiction only over § 502(a)(1)(B) and § 502(a)(7) suits (relating to the terms

of the plan and state actions to enforce medical child support orders). *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1); H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107. If ERISA were treated as a term of a plan, state courts would, by reason of § 502(a)(1)(B), have concurrent jurisdiction to decide statutory ERISA issues rather than merely to interpret and enforce plan terms – contrary to Congress's intent.

B. A Participant May Sue Under § 502(a)(1)(B) For Individualized Relief Regarding The Participant's Current Or Future Benefits Or Rights Under The Terms Of An Employee Benefit Plan.

In *Aetna Health Inc.* v. *Davila*, 542 U.S. 200 (2004), this Court summarized § 502(a)(1)(B) as follows:

> This provision is relatively straightforward. If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to "enforce his rights" under the plan, or to clarify any of his rights to future benefits. Any dispute over the precise terms of the plan is resolved by a court under a de novo review standard, unless the terms of the plan "giv[e] the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Id. at 210 (citations omitted).

The Court has addressed the scope of § 502(a)(1)(B) on several occasions.

In *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987), the Court ruled that ERISA § 514 preempted a state common-law action for improper processing of a claim for disability benefits on the ground that the state law related to an employee benefit plan.

In *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), the Court held that a state common-law claim alleging an improper denial of medical care coverage to which the plaintiff was entitled *solely* because of the terms of an ERISA-regulated benefit plan was automatically converted into a federal claim. *Id.* at 65-68. The Court explained that "causes of action *within the scope of* the civil enforcement provisions of 502(a) [are] removable to federal court." *Id.* at 65-66 (emphasis added).

In both *Pilot Life* and *Taylor*, the Court concluded that the state-law claims fell *within the scope of* § 502(a)(1)(B) and therefore were preempted because the asserted state-law claims required the plaintiffs to show, at a minimum, that they were entitled to the benefits in question under the terms of their ERISA-governed plans.

More recently, relying on *Taylor* and *Pilot Life*, the Court ruled in *Aetna Health* that § 502(a) preempted state-law causes of action that fell "*within the scope of* § 502(a)(1)(B)":

> [I]f an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated then

> the suit falls within the scope of ERISA § 502(a)(1)(B).

Aetna Health, 542 U.S. at 210 (internal quotation marks omitted).

Taylor, *Pilot Life*, and *Aetna Health* establish that a claim falls "within the scope of § 502(a)(1)(B)" if the claim seeks to remedy what the claimant regards as a wrongful denial of benefits offered by an ERISA-regulated plan, *i.e.*, to vindicate the claimant's right to present or future benefits under the terms of the plan, rather than to vindicate a right that is independent of the terms of the plan, such as a right under ERISA or any other statute. Here, because petitioner's complaint seeks to vindicate his right to benefits under the terms of the Plan, his claim falls "within the scope of § 502(a)(1)(B)."[8]

C. Because Petitioner Seeks Individualized Relief Regarding His Current Or Future Benefits Or Rights Under The Terms Of An Employee Benefit Plan, He Could Have Sued Under § 502(a)(1)(B).

Section 502(a)(1)(B) addresses Congress's primary concern regarding individual plan participants and beneficiaries: that they receive the benefits and rights to which they are entitled under their plans. To this end,

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[8] Consistent with the text of § 502(a)(1)(B) and *Pilot Life*, *Taylor*, and *Aetna Health*, courts have held that § 502(a)(1)(B) provides a cause of action *only* for benefits due under the terms of the plan, and not for ERISA statutory claims. *See, e.g.*, *Todisco* v. *Verizon Commc'ns, Inc.*, No. 06-1957, 2007 U.S. App. LEXIS 18621 (1st Cir. Aug. 6, 2007); *Ross* v. *Rail Car Am. Group Disability, Inc. Plan*, 285 F.3d 735, 740, 742 (8th Cir. 2002); *Carrabba* v. *Randalls Food Mkts.*, 252 F.3d 721 (5th Cir. 2001), *aff'g* 145 F. Supp. 2d 763 (N.D. Tex. 2000); *Haberern* v. *Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1500-01 (3d Cir. 1994).

§ 502(a)(1)(B) makes available a variety of remedies, including declaratory judgment, injunctions and monetary relief. *See Russell*, 473 U.S. at 147; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989).

1. Petitioner Seeks Individualized Relief.

Petitioner seeks relief only for himself. His complaint asks the court to award "make whole relief" to "Plaintiff." He does not seek relief for other participants or for the Plan itself. In fact, the Plan is one of the *defendants* that petitioner sued. The complaint refers to the Plan's failure to follow petitioner's directions regarding the investment of "his money," but it neither asserts that other participants had been treated in the same way nor claims that the Plan is an intended beneficiary of the suit in which the Plan is a defendant.[9]

The relief that petitioner seeks is the amount by which, he alleges, the value of his interest in the Plan has been depleted, not the amount of a loss that the Plan has incurred. The complaint does not even allege that the Plan has incurred a loss. *See Matassarin* v. *Lynch*, 174 F.3d 549, 566 (5th Cir. 1999) (no cause of action under § 502(a)(2) unless a loss to the plan).[10]

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[9] *See Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-47 (1985) ("To recover the benefits due her, she could have filed an action pursuant to § 502(a)(1)(B). . . . If the plan administrator's refusal to pay contractually authorized benefits had been willful and part of a larger systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary pursuant to §§ 502(a)(2) and 409.").

[10] The complaint named only DeWolff and the Plan as defendants and did not allege facts sufficient to establish that the alleged failure to follow petitioner's directions was caused by a fiduciary's breach of fiduciary duty rather than by a clerical error. *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (person is a fiduciary only "to the extent" performing or responsible for performing fiduciary functions); 29

2. Petitioner Seeks Individualized Relief Regarding His Current Or Future Benefits Or Rights.

Petitioner seeks relief relating to both his current and future benefits *and* his current and future rights. He requests relief directly related to the amount of his benefit under the Plan: the balance in his account. Petitioner alleges that the Plan's failure to follow his investment directions caused his account balance to be depleted by approximately $150,000. Petitioner thus seeks relief relating to both his current and future benefits and his current and future rights to give investment directions.[11]

3. Petitioner Seeks Individualized Relief Regarding His Current Or Future Benefits Or Rights Under The Terms Of An Employee Benefit Plan.

The basis for petitioner's complaint is that the Plan's failure to follow his directions regarding the investments allocable to his account reduced the size of his account

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C.F.R. § 2509.75-8, D-2 (clerical functions are not fiduciary functions) (2007); *Pegram* v. *Herdrich*, 530 U.S. 211, 225-26 (2000) ("threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action"); *Beddall* v. *State St. Bank & Trust Co.*, 137 F.3d 12, 18-21 (1st Cir. 1998) (mechanical administrative responsibilities are not fiduciary responsibilities).

[11] Investments allocable to a participant's account and a participant's right to direct such investments are treated as plan benefits for purposes of applying § 401(a)(4) of the Internal Revenue Code, which provides that a tax-qualified plan may not provide discriminatory benefits. *See, e.g.*, Treas. Reg. § 1.401(a)(4)-1(a), -1(b)(3), -4(a), -4(b), -4(c), -4(e)(3)(iii)(B); Rev. Rul. 93-87, 1993-2 C.B. 125, *superseding* Rev. Rul. 73-383, 1973-2 C.B. 137, Rev. Rul. 71-93, 1971-1 C.B. 122, *and* Rev. Rul. 70-370, 1970-2 C.B. 84 (rules in effect when ERISA was enacted).

balance, which determined the size of his benefit under the Plan. Because ERISA does not give participants the right to direct investments, the relief that petitioner seeks is necessarily based on the terms of the Plan.

4. Section 502(a)(1)(B) Authorizes The Relief Petitioner Seeks.

Many participants and beneficiaries in other plans, with claims similar or analogous to petitioner's claim, have filed civil actions under § 502(a)(1)(B) to enforce their claims. Where a claimant has established that he or she has not received the benefits or been afforded the rights to which the claimant was entitled under the terms of the plan, courts have ordered relief, including monetary relief, to make up for the plan's failure to provide the benefits or rights to which the claimant was entitled under the terms of the plan.

Illustrative claims for which relief has been sought under § 502(a)(1)(B) are listed below. The claimants obtained the relief they sought in some cases, but not in others. This is because the courts did not consider every claim to be meritorious, rather than because relief under § 502(a)(1)(B) was unavailable. *See generally Aetna Health*, 542 U.S. at 210-11 ("Upon the denial of benefits, respondents could have paid for the treatment themselves and then sought a reimbursement through a § 502(a)(1)(B) action. . . .").

- Alleged failure to implement investment directions in accordance with the terms of the plan: *Hess* v. *Reg-Ellen Mach. Tool Corp.*, 423 F. 3d 653, 657 (7th Cir. 2005); *Babcock* v. *Computer Assocs. Int'l, Inc.*, 186 F. Supp. 2d 253, 261 (E.D.N.Y. 2002).

- Alleged failure to make rollover from 401(k) plan to IRA on the date required by the plan: *Saylor* v. *Ret. Comm.*, No. 4:05CV138, 2007 U.S. Dist. LEXIS 54399 (E.D. Ark. July 25, 2007).

- Failure to allow employees allegedly eligible employees to participate in defined contribution plan: *Vizcaino* v. *Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997); *Krackow* v. *Dr. Jack Kern Profit Sharing Plan*, No. 00 CV 2550 (NG) (RLM), 2002 U.S. Dist. LEXIS 20524, at *11 (E.D.N.Y. May 29, 2002).

- Alleged failure to value benefits on the date specified by the plan: *Janeiro* v. *Urological Surgery Prof'l Ass'n*, 457 F.3d 130, 136-37, 142-43 (1st Cir. 2006); *Nelson* v. *EG&G Energy Measurements Group, Inc.*, 37 F.3d 1384 (9th Cir. 1994).

- Alleged failure to distribute benefits on the date specified by the plan: *Dobson* v. *Hartford Fin. Servs. Group, Inc.*, 389 F.3d 386, 396-400 (2d Cir. 2004); *Rego* v. *Westvaco Corp.*, 319 F.3d 140, 148 (4th Cir. 2003).

- Alleged failure to fund benefits at time of plan spin-off in accordance with the terms of the plan: *Kinek* v. *Paramount Commc'ns, Inc. Pension Plan*, 22 F.3d 503, 512-13 (2d Cir. 1994).

- Alleged failure to provide health insurance coverage required by terms of the plan: *Heffner* v. *Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330 (11th Cir. 2006) (citing cases).

- Payment of death benefit to person alleged not to be the beneficiary designated in accordance with the plan: *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, No. 05-41851, 2007 U.S. App. LEXIS 19336, at *3-*8 (5th Cir. Aug. 15, 2007).

These cases demonstrate that § 502(a)(1)(B) authorizes the grant of monetary relief to participants who establish that they have not received the benefits to which they are entitled under the terms of the plan. The cases belie any

claim that ERISA must be amended to authorize a court to grant such relief.[12]

D. Because § 502(a)(1)(B) Offered Adequate Relief For Petitioner's Alleged Injury, Petitioner Was Not Entitled To Bring This Suit Under § 502(a)(2) Or (3).

As explained in Section III.C, petitioner had the right to seek the benefits he claimed by exercising his rights under ERISA § 503 and the Plan's benefit claim procedure, and if his claim was denied initially, and denied again on review, he had the right to sue under § 502(a)(1)(B). Because petitioner failed to do this, he gave up his right under ERISA to claim the benefits he believes he is due under the terms of the Plan.

The relief that petitioner seeks under § 502(a)(2) and (3) – an award equal to the benefits he claims to have lost – is the same relief that he could have sought under

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[12] Contrary to petitioner's assertion (Pet. Br. at 17-18), by drawing on the funds in an unallocated suspense account, a defined contribution plan can make a payment to a participant, or allocate funds to a participant's account, without reducing other participants' account balances. The funds in such suspense accounts come from a variety of sources, such as employer contributions made early in the year and forfeitures (typically created by participants who terminate employment before being fully vested). Such contributions and forfeitures can be allocated initially to a suspense account and then allocated to individual participants' accounts, or used to pay plan expenses, later in the year. *See* Rev. Rul. 80-155, 1980-1 C.B. 84 (permitting plan to hold unallocated funds until year end). Suspense accounts also can be created for a variety of other reasons. *See, e.g.*, Rev. Proc. 2006-27, App. A § .08, App. B. § 2.04(2)(a), 2006-1 C.B. 945. If a plan lacks sufficient unallocated funds to make a payment or allocation, the shortfall can be funded by future employer contributions or, if a breach of fiduciary duty caused the plan to incur a loss, by "restorative payments" that the plan collects from the responsible fiduciary pursuant to a separate action against the fiduciary under § 502(a)(2). *See* Rev. Rul. 2002-45, 2002-1 C.B. 116.

§ 502(a)(1)(B). The relief that petitioner seeks under § 502(a)(2) and (3) is not "appropriate" both because it is unnecessary and because it improperly converts a benefit claim into a fiduciary breach claim.

It is irrelevant that, by suing only under § 502(a)(2) and (3), petitioner gave up his right to sue under § 502(a)(1)(B). *See Jones* v. *American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1073 (11th Cir. 2004) ("The relief that the plaintiffs sought in their complaint was not relevant to this inquiry."). ERISA's remedial provisions allow a participant in an existing plan to make a claim for benefits under the terms of the plan only under § 502(a)(1)(B). Given ERISA's detailed remedial provisions, it defies common sense to think that Congress intended to allow a participant with a claim for benefits under the terms of the plan to evade the rules that Congress designed for such claims and to invoke instead rules designed for other types of claims. *Cf. Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965) ("A . . . rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.").

IV. Allowing Benefit Claim Suits To Be Brought Under § 502(a)(2) Or (3) Would Undermine ERISA's Benefit Claim Procedures.

A. Participants Could Circumvent The Exhaustion Requirement And The Abuse Of Discretion Standard Of Review.

If participants were allowed to recast benefit claims as fiduciary breach claims, and to pursue benefit claims outside of the procedures that ERISA prescribes for benefit claims, participants could readily circumvent the benefit claim process, including the exhaustion requirement and the abuse of discretion standard of review that apply to most benefit claims under ERISA.

1. Exhaustion.

ERISA's benefit claim procedures and the exhaustion requirement help to avoid unnecessary lawsuits and to foster efficient, nonadversarial dispute resolution and consistent decision-making by experienced and knowledgeable plan administrators. They also develop a record for a court to review in the event of litigation. *See Makar* v. *Heath Care Corp.*, 872 F.2d 80, 82-83 (4th Cir. 1989). If petitioner's position is upheld, benefit claimants will be able to circumvent plans' benefit claim procedures and deprive plans and plan participants of the benefit of the exhaustion requirement.

The courts of appeals agree that, in general, ERISA's remedial scheme implicitly requires that, in order to state a claim for benefits under § 502(a)(1)(B), a participant must first exhaust the plan's administrative remedies. *See Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 n.4 (6th Cir. 1998) (citing cases); *Kennedy* v. *Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594-95 (2d Cir. 1993).[13] The vast majority of benefit claims are resolved through this process. *See* 65 Fed. Reg. at 70,263, tbl. 4, ll. 1-6 (Nov. 21, 2000).

Although we do not know what issues would have been raised if petitioner had followed the Plan's benefit claim procedure, the Plan's administrators might have questioned whether petitioner's directions were (1) received by the Plan, (2) timely and unambiguous, (3) consistent with the Plan's requirements regarding the procedure for giving investment directions, or

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[13] Courts have excused failure to comply with the exhaustion requirement in some cases, such as where the court has found that resorting to the plan's procedures would be futile or that the plan had thwarted the proper operation of the claim procedures. *See, e.g., Paese* v. *Hartford Life & Accident Ins. Co.* 449 F.3d 435, 443-49 (2d Cir. 2006); *Lee* v. *California Butchers' Pension Trust Fund*, 154 F.3d 1075, 1079-81 (9th Cir. 1998).

(4) unlawful, inconsistent with Plan rules, or impossible or impractical to implement. Analogous issues arise under other plans, and plan administrators are typically well-positioned to resolve them.

2. Standard Of Review.

In *Bruch*, 489 U.S. at 115, the Court held that, if a plan administrator or other fiduciary has been granted discretion to construe the terms of the plan and a plan participant challenges the administrator or fiduciary's decision to deny a claim for benefits in an action under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), the court should apply the abuse of discretion standard in reviewing the benefit denial decision. The Court stated that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)).

The abuse of discretion standard of review assures the employer that if its plan grants discretion to a plan fiduciary to interpret the terms of the plan, the plan will be administered consistently and in accordance with the employer's purpose in establishing the plan. In *Black & Decker Disability Plan* v. *Nord*, the Court contrasted *statutory claims*, where benefit entitlement is based on uniform federal criteria, with *plan-based claims* under voluntary ERISA plans where employers have great leeway to design benefits:

> "[T]he validity of a claim to benefits under an ERISA plan," on the other hand, "is likely to turn," in large part, "on the interpretation of terms in the plan at issue." It is the Secretary of Labor's view that ERISA is best served by "presev[ing] the greatest flexibility possible for . . . operating claims processing systems

> consistent with the prudent administration of a plan." Deference is due that view.

538 U.S. 822, 833-34 (2003) (citations omitted).

If petitioner's position is upheld, benefit claimants will be able to circumvent plans' benefit claim procedures, and plans will lose the benefit of the abuse of discretion standard of review.

B. Courts Would Be Required To Review Benefit Claims Without An Administrative Record.

In general, a plan administrator's decision to deny a claim for benefits under the plan is reviewed solely on the basis of the record before the administrator. *See, e.g.*, *Liston* v. *UNUM Corp. Officer Severance Plan*, 330 F.3d 19, 23-25 (1st Cir. 2003) (citing cases). If claimants can evade plans' benefit claim procedures by recasting their benefit claims as fiduciary breach claims, courts will often have no record to review and will therefore be required to assume decision-making responsibilities that Congress assigned to plan administrators.

C. Plan Costs Would Increase, Harming Employees And Benefit Plans.

If participants with benefit claims believe that litigation will improve their prospects for recovery, plans' litigation costs will increase, and plans will be required to allocate a higher percentage of their resources to litigation and a smaller percentage to benefits. Mounting litigation expenses will also increase the pressure on fiduciaries to resolve benefit claims by settling on terms that are more favorable to claimants than the merits of the claims would justify – diverting plan assets to provide benefits that the plan was not designed to provide. Moreover, permitting benefit suits to be brought outside of ERISA's benefit claim procedures will, contrary to

Congress's intent, result in more benefit claim decisions being made in the first instance by judges and fewer by fiduciaries familiar with the operation, history, and purposes of the plan.

These consequences will discourage employers from establishing new benefit plans, encourage employers to terminate existing plans, and require plan fiduciaries to increase the percentage of plan resources devoted to legal fees and costs and to reduce the percentage devoted to providing benefits. *See Cooper* v. *IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible . . . for litigation about pension plans to make everyone worse off."), *cert. denied*, 127 S. Ct. 1143 (2007). This is hardly the vision that Congress had when it enacted ERISA.

CONCLUSION

For all of these reasons, as well as those set forth in the brief for respondents, *amicus curiae* respectfully urges the Court to affirm the decision below.

Respectfully submitted,

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JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS*[1]

The National Employment Lawyers Association ("NELA") and its 67 state and local affiliates have a membership of over 3,000 attorneys. NELA is the nation's largest professional membership organization of lawyers who represent employees in labor, employment, and civil rights disputes. NELA supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the interpretation and application of the Employee Retirement Income Security Act (ERISA) to ensure that the rights of workers are protected. For example, NELA filed or participated in filing *amicus curiae* briefs in this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); and *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004).

ERISA Sections 409 and 502(a)(2) together authorize a plan participant to file suit on behalf of his or her plan to restore losses to the plan occasioned by a breach of fiduciary duty. 29 U.S.C. §§ 1109, 1132(a)(2). Regarding the first question presented, in NELA's view, these sections contemplate relief for any loss suffered by a plan, regardless of whether all participants in the plan are harmed by the loss.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than *amicus curiae* and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party to this matter authored this brief in whole or in part. Petitioner has filed a consent to the filing of *amicus* briefs with the Clerk of this Court. Respondent has separately consented to the filing of this brief.

Neither the statute nor this Court's prior interpretation of it in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), requires that such a claim be supported by a showing that not only the plan itself, but all participants in the plan, have suffered a loss due to the breach. NELA members represent participants in defined contribution pension plans who have an interest in ensuring that losses to those plans due to fiduciary breaches can be restored pursuant to Sections 409 and 502(a)(2) without regard to whether the losses affect one participant, a subset of participants, or all participants.

Regarding the second question presented, NELA supports the position of Petitioner, the Solicitor General, and other *amici* that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), as interpreted by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), authorizes a claim for make-whole monetary relief by a plan participant or beneficiary against a breaching fiduciary, because such relief was typically available in equity in the days of the divided bench. It is NELA's further view, however, that the *Mertens* gloss on the statutory provision for "appropriate equitable relief" incorrectly severed ERISA remedies from their trust-law roots, leading to inconsistent and unpredictable outcomes in the lower courts and frustrating the Congressional purpose of providing remedies for the fiduciary obligations imposed by the statute. NELA members represent participants in ERISA-governed pension and welfare benefit plans who have an interest in ensuring that the duties imposed on their plans' fiduciaries are enforceable under the statute.

For these reasons, *amicus* respectfully requests that the Court consider its views in support of Petitioner.

SUMMARY OF ARGUMENT

The first question presented, whether a participant in a defined contribution pension plan may file suit under ERISA Section 502(a)(2) to compel a fiduciary to restore losses to the plan occasioned by a fiduciary breach that affected only the participant's individual account, should be answered in the affirmative. This Court has consistently refused to countenance remedies under ERISA that are not expressly authorized by the statute, and has equally refused to countenance implied limitations on the remedies that the statute does expressly authorize. ERISA Sections 502(a)(2) and 409 together authorize a participant to file suit to impose on a fiduciary personal liability to make good "any losses" to a plan that result from a breach of fiduciary duties. 29 U.S.C. §§ 1132(a)(2), 1109. By operation of the statute and consistent with the law of trusts, every ERISA-governed pension plan, even a defined contribution plan, consists of a unitary corpus of trust assets. Therefore, any loss to an account in such a plan is a loss to the plan as a whole. Nothing in the statute authorizes limiting the relief under Section 502(a)(2) to breaches of fiduciary duty that result in losses affecting more than one account in an individual account plan. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), is not to the contrary, but merely stands for the proposition that Section 502(a)(2) does not authorize a claim for relief that flows directly to the plan participant, where the plan itself has not suffered a loss due to the alleged breach.

The second question presented, whether ERISA Section 502(a)(3) authorizes a claim for make-whole monetary relief against a breaching fiduciary, should also be answered in the affirmative. As Petitioner, the Government, and other

amici argue, such relief was "typically available in equity" as required by *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993). However, NELA further contends that the *Mertens* standard improperly decouples trust-law fiduciary responsibilities from trust-law remedies, contrary to Congress's intent in incorporating principles of trust law into ERISA. The requirement that relief have been "typically available in equity" is not grounded in any trust-law standard, has resulted in inconsistent and result-oriented decision-making in the lower courts, has been widely decried by courts and commentators, deprives plan participants of remedies for violations of fiduciary duties, and should be overruled.

ARGUMENT

I. Section 502(a)(2) Provides Relief for *Any* Loss to a Plan, Regardless of the Number of Affected Participants.

The court below held that where the effect of a breach of fiduciary duty is limited to assets allocated to the account of a single participant in an "individual account" or "defined contribution" pension plan, that participant cannot state a claim under Section 502(a)(2) because the losses resulting from the breach are losses to an individual participant, not losses "to the plan as a whole." *LaRue v. DeWolff, Boberg & Associates*, 450 F.3d 570, 573-74 (4th Cir. 2006) (*LaRue I*). This holding ignores the plain text of the statute and the structure of defined contribution plans, misconstrues this Court's decision in *Russell*, and establishes a distinction between breaches affecting a single participant and those affecting more than one participant that is unsupported by any authority or policy.

A. Nothing in the Text of ERISA Limits Section 502(a)(2) Claims to Plan Losses Affecting More Than One Participant.

ERISA § 502(a)(2) provides that a participant may bring a civil action for "appropriate relief under section 1109 [section 409]." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, imposes personal liability on plan fiduciaries to "make good to such plan *any losses* to the plan" resulting from breaches of fiduciary duty. 29 U.S.C. § 1109(a) (emphasis added).[2] Thus, by its terms, the statute requires that *any losses* occasioned by a breach be restored, not just particular kinds of losses or losses affecting particular individuals or groups of participants.[3]

When interpreting ERISA's civil enforcement provision, Section 502(a), this Court has given effect to the plain language of the statute in view of the "evident care" with which Section 502(a) was crafted. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Accordingly, this Court has been unwilling to read into ERISA any implied claims or remedies, *see id.*, as well as

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[2] The Section 502(a)(2) cause of action is analogous to the common-law cause of action of a beneficiary against a trustee to restore trust assets lost due to a breach of trust. *Graden v. Conexant Systems, Inc.*, 2007 WL 2177170, at *2 (3d Cir. July 31, 2007).

[3] In *LaRue I*, the court suggested that the nature of the breach, in addition to the nature of the loss, might be a basis for finding Mr. LaRue's claim not cognizable under Section 502(a)(2). The court wrote that the "loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him." *LaRue I*, 450 F.3d at 574. However, Section 409 imposes personal liability on any fiduciary "who breaches *any* of the responsibilities, obligations, or duties imposed upon fiduciaries by this title." 29 U.S.C. § 1109(a) (emphasis added). Section 409 does not authorize a distinction between duties owed to participants individually and duties owed to participants as a group.

to read into ERISA any limitations on claims or remedies. For example, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the defendant employer argued that because Section 502(a)(2) specifically allowed claims to remedy fiduciary breaches, such claims could not be pursued under Section 502(a)(3), 29 U.S.C. § 1132(a)(3). This Court rejected that argument because the plain language of Section 502(a)(3) allows, without limitation, suits to remedy violations of ERISA. *Id.* at 509. Likewise, in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 239 (2000), the Court refused to limit the universe of defendants who could be sued under Section 502(a)(3) because there was no such limiting language in that provision.

Nothing in the text of Sections 409 or 502(a)(2) limits claims cognizable under Section 502(a)(2) to claims that seek to recover a plan's losses under circumstances where more than one participant is harmed by the plan's loss, and no such limitation can be read into Section 502(a)(2).

B. An Allegation of a Loss Affecting a Single Plan Account Is an Allegation of Loss to the Plan.

Although the plan in which Mr. LaRue participated is an individual account or defined contribution plan, a reduction in the plan's assets is a loss to the plan regardless of whether the loss affects assets allocated to one account or all accounts, because the plan consists of a unitary corpus of trust assets. Thus, the loss alleged by Mr. LaRue is a plan loss.[4]

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[4] The Fourth Circuit focused on Mr. LaRue's allegation of a loss "to his 'interest in the plan'" rather than a "'loss to the plan.'" *LaRue v.*

(Continued on following page)

Regardless of whether a pension plan is a defined benefit plan or a defined contribution plan,[5] ERISA requires that plan assets be held in trust by one or more trustees who have exclusive authority and discretion to manage and control the assets. *See* ERISA § 403(a), 29 U.S.C. § 1103(a); IRC § 401(a). It is the trustee, not the plan participants, who holds legal title to all of the plan's assets. *See* Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989). Indeed, it is a cardinal principle of trust law that title to trust assets is held by the trustee for the benefit of the trust beneficiaries. *See, e.g.*, CHARLES E. ROUNDS, JR., LORING: A TRUSTEE'S HANDBOOK, 2001 ed. (Aspen Pubs.) at 1 ("[T]itle and asset segregation are the keys to unlocking the secret of the trust."); GEORGE G. BOGERT & DALLIN H. OAKS, HANDBOOK ON THE LAW OF TRUSTS, 5th ed. (West 1973) at 1 ("A trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another."). Because it is a fundamental characteristic of trusts that all of their assets are held by the trustee, it follows that any reduction in the value of those assets is a loss to the trust itself.

That certain types of ERISA plans, such as the plan here, permit participants to direct the investment of assets allocated to their accounts among various investment

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DeWolff, Boberg & Assocs., Inc., 458 F.3d 359, 361 (4th Cir. 2006) (*LaRue II*). Notwithstanding this wording, the nature of an ERISA-governed pension plan is such that there can be no loss to a participant's "interest in the plan" without a loss to the plan as a whole, as discussed below.

[5] *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980) (distinguishing defined benefit and defined contribution pension plans).

options selected by the plan's fiduciaries does not alter this fundamental trust law principle. Participants still lack actual ownership over the assets allocated to their accounts and trustees still hold legal title. *See* Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989) ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account balance will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will.") (citations omitted). Instead, the amounts recorded in each individual "account" together make up the plan's assets. DAN M. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS, 5th ed. (Pension Research Council 1984), at 99 (in a defined contribution plan, "[t]he sum of all of the account balances on any valuation date usually equals the total market value of the plan assets"). Accordingly, whenever there is a loss reflected in an individual "account" in a defined contribution plan, such as the plan here, there is a corresponding loss to the plan as a whole. *See* Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 235 (2004) ("In [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts."). Thus, contrary to the Fourth Circuit's rationale, there is no such thing as a loss to a participant account that is separate from or independent of a loss to the plan as a whole.

Because Sections 502(a)(2) and 409 together authorize a participant to file suit to recover "any loss" to a plan occasioned by a breach of fiduciary duty, the statute empowers Mr. LaRue to proceed on behalf of his plan to

compel the plan's fiduciaries to make good to the plan the losses to the trust corpus occasioned by the alleged breach, notwithstanding that those losses were allocated to Mr. LaRue's individual account.

C. This Court Held in *Russell* That Section 502(a)(2) Claims Are Limited to Those Involving Plan Losses.

The Fourth Circuit invoked the holding of *Russell* that recovery under Section 502(a)(2) must inure to the benefit of the plan rather than to the benefit of a participant or beneficiary, but failed to properly apply that holding. In *Russell*, the subject plan's fiduciaries terminated an individual participant's disability benefits. *Russell*, 473 U.S. at 137. After the fiduciaries reversed their decision and reinstated the benefits, the participant filed suit for breach of fiduciary duty, claiming that the interruption of benefit payments aggravated her psychological and physical conditions and seeking, assertedly pursuant to Section 502(a)(2), punitive and emotional distress damages to be paid directly to her. *Id.* at 138. The participant did not assert that the alleged breach caused losses to the plan; on the contrary, the plan presumably benefitted financially from the delay in paying out the benefits.

This Court held that Section 502(a)(2)'s authorization of a participant suit to make good losses to a plan did not extend to the relief sought by the plaintiff in *Russell*. Rather, this Court held that "recovery for violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140. However, contrary to the Fourth Circuit's interpretation in this case, *Russell* does not stand for the proposition that a

Section 502(a)(2) claim is not cognizable under any circumstance where relief to the plan will ultimately benefit individual plan participants. *See LaRue I*, 450 F.3d at 573 (holding relief under Section 502(a)(2) cannot inure "to particular persons with rights under the plan"). Indeed, because a pension plan must be administered for the exclusive purpose of providing benefits to participants,[6] the Fourth Circuit's interpretation would render Section 502(a)(2) a dead letter, because any recovery of losses to a plan must ultimately inure to the benefit of "particular persons with rights under the plan."

Because *Russell* merely distinguished between a suit seeking damages for a plan participant, unrelated to any plan loss, and a suit seeking to restore losses to a plan occasioned by a fiduciary breach, *Russell* does not support the holding below.

D. There Is No Justification for Distinguishing Between Plan Losses Affecting a Single Account in an Individual Account Plan and Plan Losses Affecting Multiple Accounts.

As the Fourth Circuit correctly recognized, nothing in Section 502(a)(2) supports a distinction between a claim to restore losses to a plan where the alleged breach has affected a subset of plan accounts and a claim to restore losses to a plan where the alleged breach has affected all plan accounts. *LaRue II*, 458 F.3d at 362-63. However, the

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[6] *See* ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries; and . . . defraying reasonable expenses of administering the plan."

Fourth Circuit discerned a line separating such claims from claims to restore losses to a plan where the alleged breach has affected only a single account. *Id.* Just as there is nothing in the text of ERISA to support limiting Section 502(a)(2) claims to those seeking to remedy a loss affecting all plan accounts, there is nothing in the text of the statute to support allowing Section 502(a)(2) claims where more than one, but fewer than all, plan participants are affected by a plan loss while not allowing Section 502(a)(2) claims where only one participant is affected.

The decisions cited by the Fourth Circuit do not support the proposition that relief for a breach that affects one account is unauthorized "individual" relief. Instead, like *Russell*, these cases seek to distinguish between situations where a participant files an individual claim seeking damages payable directly to the participant, and situations where one or more participants seek to have losses "made good" to the plan by a breaching fiduciary. *See In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 240, 241 (3d Cir. 2005) (distinguishing *Russell* on the ground that "it only held that a single plan participant, seeking individual recovery for extra-contractual damages payable directly to her, could not proceed with her lawsuit" under Section 502(a)(2) and holding that *Russell* "never reached the conclusion . . . that standing can exist under [§ 1132(a)(2)] only if all plan participants would benefit from the litigation"); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (holding that "§ 1109 contemplates that breaches of fiduciary duty injure the plan, and, therefore, any recovery under such a theory must go to the plan" and distinguishing "between a plaintiff's attempt to recover on his own behalf and a plaintiff's attempt to have the fiduciary reimburse the plan"); *see also Milofsky v. Am.*

Airlines, Inc., 442 F.3d 311, 313 (5th Cir. 2006) (allowing Section 502(a)(2) claim to proceed where subset of plan participants were affected, but expressing no opinion on whether the result would be different if only one participant was affected); *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003).

Further, there is no meaningful way to differentiate among Section 502(a)(2) claims involving subsets of plan participants. If a plan loss affecting a single participant is deemed insufficient to give rise to a Section 502(a)(2) claim, is a plan loss affecting two participants – that is, two individuals – also insufficient? The relevance of the requisite number of affected participants in relation to the total number of plan participants must also be considered. If one or two affected participants is insufficient to permit a Section 502(a)(2) claim in the context a plan with a thousand participants, does the result change if the plan only has three participants? If so, when does the ratio of affected plan participants to total plan participants tip the balance? And what if the bulk of the plan assets are allocated to a single account – is relief for a breach affecting only that account "individual" relief, or relief to "the plan as a whole"? As these questions illustrate, there is no principled way for this Court to draw a line between Section 502(a)(2) claims affecting all or multiple plan participants and those affecting a single plan participant. Moreover, the text of the statute does not support drawing such a distinction. So long as the claim seeks to remedy a loss to the plan, Section 502(a)(2) provides a remedy.

While Petitioner's case presents the outward limits of 502(a)(2) in that his claim involves a plan loss affecting only one participant, most participants seeking relief under Section 502(a)(2) are seeking to remedy plan losses

affecting a large portion of plan participants. *See Kuper*, 66 F.3d at 1450 (subset of plan participants comprising participants in ESOP); *Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000) (subset of plan participants whose accounts held preferred company stock); *In re Xerox Corp.*, 483 F. Supp. 2d 206, 221 (D. Conn. 2007) (same); *Lively v. Dynegy, Inc.*, 420 F. Supp. 2d 949, 951 (S.D. Ill. 2006) (plaintiffs sought to represent class of plan participants for whose individual accounts the plan held shares of company stock); *Rankin v. Rots*, 220 F.R.D. 511, 517 (E.D. Mich. 2004) (subset of thousands of affected participants); *Kling v. Fidelity Management Trust Co.*, 270 F. Supp. 2d 121, 125 (D. Mass. 2003) (subset of 3,500 participants who invested in plan's most popular investment option). Thus, any ruling that Section 502(a)(2) claims could only be asserted where all plan participants were affected would be widely felt by participants in increasingly popular defined contribution plans.

The Fourth Circuit mistakenly feared that if Mr. LaRue's claim were cognizable under Section 502(a)(2), then "every purely individual claim for breach of fiduciary duty" would be transformed into a Section 502(a)(2) claim. *LaRue II*, 458 F.3d at 361. As *Russell, Varity,* and a host of other decisions illustrate, many claims for breach of fiduciary duty are not cognizable under Section 502(a)(2) because the alleged breach has not caused losses to a plan. Indeed, the Fourth Circuit cited some of these cases, but failed to recognize that their common characteristic is that they involved claims for losses suffered by participants rather than by plans. *LaRue II*, 458 F.3d 363-64. For example, the Fourth Circuit quoted *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 149 (2d Cir. 1999), as holding

that "an individual plaintiff 'cannot proceed under Section 502(a)(2) because it affords no remedies to individual beneficiaries.'" *LaRue II*, 458 F.3d at 363. *Strom* involved a claim by a plan beneficiary that a fiduciary had failed to forward life insurance plan enrollment forms to the plan's insurance carrier, with the result that, when the plan participant died, the beneficiary received no benefit. *Strom*, 202 F.3d at 140. Just as in *Russell*, there was no harm to the plan from the breach; indeed, the plan had more assets as a result than if the fiduciary had fulfilled its duty to timely forward the enrollment materials. Just like *Russell*, *Strom* stands for the proposition that Section 502(a)(2) does not authorize relief for injury directly to a plan participant, not for the proposition that no individual can proceed under Section 502(a)(2) to compel a fiduciary to restore losses to a plan or that the losses sought to be recovered must have affected more than one account in a defined contribution plan.

In sum, Section 502(a)(2) does not provide a cause of action to participants like Ms. Russell or beneficiaries like Ms. Strom, who allege breaches causing losses to themselves, but does provide a cause of action to participants like Mr. LaRue, who alleges a breach causing losses to his plan.

II. Make-Whole Monetary Relief Is "Appropriate Equitable Relief" Against a Breaching Fiduciary Within the Meaning of Section 502(a)(3).

The second question presented, whether an action by a plan participant for make-whole monetary relief against a breaching fiduciary seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), is of considerable importance. NELA urges the Court to

reach this issue even if the Court holds that Petitioner's claim to restore losses to his defined contribution plan is cognizable under Section 502(a)(2). NELA joins the arguments of Petitioner, the Government, and other *amici* that make-whole monetary relief against a breaching fiduciary was "typically available in equity" as required by *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and is therefore "appropriate equitable relief" under Section 502(a)(3).

NELA further submits, however, that the *Mertens* "typically available in equity" standard finds no support in the legislative history of ERISA or equity jurisprudence, has led to inconsistent outcomes in the lower courts, deprives plan participants of remedies for breaches of statutorily-imposed duties, and should be rejected in favor of a recognition that the trust-law duties incorporated into ERISA are matched by trust-law remedies, including make-whole monetary relief against breaching fiduciaries.

A. The *Mertens* Standard Requiring That Relief Have Been "Typically Available in Equity" Is Incorrect and Unworkable; Correctly Interpreted, Section 502(a)(3) Authorizes All Relief Available Against a Fiduciary for Breach of Trust.

The trust-law origins of ERISA dictate that "equitable relief" under Section 502(a)(3) incorporates the well-established, traditional remedies of a beneficiary against a breaching fiduciary, including make-whole monetary relief. This case offers an opportunity for the Court to revisit *Mertens* and return Section 502(a)(3) remedies to the trust-law framework that Congress intended. As Professor Langbein has demonstrated in his frequently cited article on Section 502(a)(3), this Court's departure

from the trust-law basis of ERISA in its seminal remedies cases has profoundly frustrated Congress's objective of coupling the fiduciary obligations of the trustee of an express trust with effective remedies to enforce those duties. John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUMBIA L. REV. 1317, 1318-54 (2003) (hereinafter "Langbein").[7]

1. ERISA Is a Regulatory Regime Developed Within the Trust Model.

In response to the widespread corruption in the administration of pension and benefit plans, Congress enacted ERISA's fiduciary and remedies provisions. Langbein at 1324 n.37. As discussed above in Section I, ERISA imposes a rule of mandatory trusteeship, requiring that "all assets of an employee benefit plan shall be held in trust by one or more trustees." ERISA § 403(a), 29 U.S.C. § 1103(a). ERISA further requires every plan to "provide for one or more named fiduciaries" who are empowered "to control and manage the operation and administration of the plan." ERISA § 402(a), 29 U.S.C. § 1102(a). A person is a fiduciary with respect to a plan to the extent he or she exercises discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets. ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

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[7] In general, "academics and legal commentators have been extremely critical of the holding espoused in *Mertens* because of its narrow scope and unjust result." *Gerbec v. United States*, 164 F.3d 1015, 1024 (6th Cir. 1999) (collecting commentaries).

Patterned after the two great principles of trust fiduciary law, loyalty and prudence, Langbein at 1325, ERISA requires that a fiduciary discharge his or her "duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . with the care, skill, prudence, and diligence, under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." ERISA § 404(a)(1), (B), 29 U.S.C. § 1104(a)(1); RESTATEMENT (SECOND) OF TRUSTS, § 170(1) (loyalty) and § 174 (prudence) (1959).

This Court has emphasized that in interpreting ERISA it will be "guided by principles of trust law" due to the clear legislative history stating Congress's intent to incorporate these principles into the statute. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989); *see Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985); *Varity Corp.*, 516 U.S. at 496 (recognizing that fiduciary duties under ERISA "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment"); *Russell*, 473 U.S. at 152-53 (Brennan, J., concurring) ("Congress intended by § 404(a) to incorporate the fiduciary standards of trust law into ERISA.").

Thus, this Court has recognized that "[w]hen federalizing the administration of pension and employee benefit plans in ERISA, Congress made a deliberate choice to subject these plans to the pre-existing regime of trust law rather than to invent a new regulatory structure." Langbein at 1319, 1324-31. ERISA's drafters wanted to "apply

rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." H.R. CONF. REP. NO. 93-1280, at 295 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5076. Accordingly, trust law provides the starting point for the analysis of "appropriate equitable relief" in claims brought pursuant to ERISA § 502(a)(3). *Harris Trust*, 530 U.S. at 250.

2. ERISA Remedy Law Tracks Trust Remedy Law, Which Provides an Aggrieved Trust Beneficiary Make-Whole Relief.

The law of trusts has long exhibited a three-part remedial system. Langbein at 1333. An aggrieved trust beneficiary may recover (1) for loss incurred, (2) for any profits that the trustee made in breach of trust, and (3) for any gains that would have accrued but for the breach. *Id.* In other words, "trust remedy law allows recovery for loss, restitution of profits, and recovery of foregone gains." *Id.* at 1334.[8] Indeed, cases awarding money damages for consequential harm, either to the trust or to the beneficiary, are commonplace in trust remedy law. *Id.* at 1337. The Uniform Trust Code of 2000 states, "[T]he court may . . . compel the trustee to redress a breach of trust by paying money." Unif. Trust Code Section 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

As Professor Langbein explains, these trust remedies are analogous to Section 502(a)'s three-part remedial

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[8] Because of the limited scope of relief available for breach of trust, incorporating trust remedy law gives content to the term "equitable relief" in Section 502(a)(3). *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens* for the proposition that " '[e]quitable relief' must mean *something* less than *all* relief").

system. *Id.* at 1334-35. Section 502(a)(1) authorizes a participant or beneficiary to bring an action "to recover benefits due." ERISA Section 502(a)(1). Section 502(a)(2), provides for actions invoking fiduciary liability under Section 409(a), which provides for recovery by the plan. *Russell*, 473 U.S. at 140. Section 409, as discussed above, authorizes recovery for "any losses," "any profits," and "such other equitable or remedial relief as the court may deem appropriate." ERISA Section 409(a). ERISA Section 502(a)(3), the "catchall" provision, *Varity*, 516 U.S. at 512, authorizes injunctive relief against "any act or practice which violates any provision of [ERISA's Title I] or other appropriate equitable relief . . . to redress such violations." ERISA Section 502(a)(3). The "other appropriate equitable relief" completes ERISA's "absorption of trust remedy law" by providing a participant or beneficiary a remedy for violations of ERISA not remedied under the other subsections. Langbein at 1335.

3. The *Mertens* Standard Departs From the Trust-Law Paradigm That Congress Intended.

The *Mertens* majority departed from this trust-law framework by decoupling ERISA remedy law from ERISA fiduciary law. Langbein at 1331. Despite the drafters' intention to apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries, *id.*, *Mertens* "rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)."[9] *Great-West*, 534 U.S. at 219. In place of

[9] However, the Court did acknowledge that "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by

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well-established, traditional trust-law remedies, *Mertens* substituted the novel category of "relief typically available in equity," a standard that the majority acknowledged represented an "unlikely" interpretation of ERISA. *Mertens*, 508 U.S. at 257. The category of relief "typically available in equity" exists nowhere outside of *Mertens*. It has "no ascertainable meaning." Langbein at 1353.

The *Mertens* majority failed to populate this category with any meaningful exemplars. As Professor Langbein has demonstrated, none of the majority's three examples of "typically equitable relief" – injunction, mandamus, and restitution – explains what relief is "equitable relief" within the meaning of Section 502(a)(3). *Id.* at 1353-54. Injunction is separately provided for in Section 502(a)(3), mandamus is a purely legal remedy, and restitution, as this Court subsequently recognized in *Great-West*, can be legal or equitable depending on the underlying cause of action. *Id.* at 1353-58; *Great-West*, 534 U.S. at 214-15. Yet the lower courts have clung to these three examples as "archetypes," *LaRue I*, 450 F.3d at 575, because the concept of relief "typically available in equity" gives no guidance in deciding what relief is "appropriate equitable relief" and what is not.

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beneficiaries for breach of trust," and "that money damages were available in those courts against the trustee." *Mertens*, 508 U.S. at 256.

B. The *Mertens* Standard Has Resulted in Inconsistent Outcomes in the Lower Courts and a Judicial Outcry Against "Betrayal Without a Remedy."

In the absence of useful guidance on the meaning of "equitable relief," the lower courts have reached inconsistent results regarding the availability of make-whole monetary relief in cases of breach of fiduciary duty under ERISA. For example, in *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996), the court held that there was no remedy available under Section 502(a)(3) where the employer-fiduciary failed to inform the employee of her eligibility to participate in a benefit plan. 102 F.3d at 378. In contrast, in *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (6th Cir. 1999), the court remanded for issuance of an order that a fiduciary to pay the benefits that the participant would have received had the fiduciary provided her with correct information about her benefits. *Id.* at 552. In *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005), medical plan participants on COBRA continuation coverage could not recover for medical expenses they incurred when their coverage lapsed due to a fiduciary's failure to process an address change. Yet in *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000), a medical plan participant was permitted to tender the COBRA premium that she would have paid but for misinformation provided by a fiduciary, upon which she would receive reimbursement for medical expenses she had incurred as a result of the loss in coverage, and in *Brown v. Aventis Pharmaceuticals, Inc.*, 341 F.3d 822, 827-28 (8th Cir. 2003), the court affirmed an order for an employer to purchase life insurance for a former employee to place her in the position that she would have occupied

but for the employer's failure to notify her of her right to convert her group life insurance coverage.

In an attempt to ameliorate the situation created by its own and other circuits' erroneous readings of this Court's decisions, the Ninth Circuit opined in *Peralta v. Hispanic Business Inc.*, 419 F.3d 1064 (9th Cir. 2005), that the availability of monetary relief in fiduciary breach cases turns not on an examination of the historical practice of equity as directed by this Court, but on the perceived extent of the fiduciary's wrongdoing:

> There seems to be little problem in providing an avenue for the payment of benefits if serious procedural errors result in the denial of benefits; and in a case such as *Varity,* where fraud is involved, the courts will go to great lengths to find a vehicle for reinstatement of benefits via a § 1132(a)(3) equitable remedy. . . .
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> * * *
>
> Individual substantive relief under ERISA is available where an employer actively and deliberately misleads its employees to their detriment. In such cases, wrongs will be undone and means found to make benefits available, as in *Varity, Blau* [*v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984)] and *Hozier* [*v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990)]. Even where benefits are not available under the applicable plan, "appropriate" equitable relief may be awarded. *See, e.g., Varity,* 516 U.S. at 515.

Id. at 1074-75 (footnote omitted). The *Peralta* court opined that Congress provided a remedy in Section 502(a)(3) for "egregious behavior" but not for "merely negligent administration." *Id.* at 1076.

While appealing in its promise that Section 502(a)(3) can be manipulated to find remedies for egregious wrongs, this reasoning finds no support in Section 502(a)(3), *Mertens, Great-West*, or even the Ninth Circuit's own precedents. For example, in one case, the employer breached its fiduciary duty by deliberately misleading plan participants regarding the taxability of distributions under an early retirement program, causing losses to the participants, but the court held that no remedy was available under Section 502(a)(3). *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 915-16 (9th Cir. 1998), *amended by* 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *see Eichorn v. AT&T Corp.*, 489 F.3d 590, 591-92 (3d Cir. 2007) (Ambro, J., concurring) (noting plaintiffs presented sufficient proof of intentional interference with benefits to survive summary judgment, but lost anyway due to lack of remedy under *Mertens*). Instead, the courts' inability to give content to the phrase "typically available in equity" in the fiduciary context frequently leaves plan participants and beneficiaries without a remedy. As recognized by Justice Ginsburg's concurrence in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), this situation can be ameliorated by recognizing that make-whole monetary relief against a breaching fiduciary was typically available in equity at the time of the divided bench – or by "fresh consideration of the availability of consequential damages under § 502(a)(3)" consistent with traditional trust-law remedies. *Davila*, 542 U.S. at 222.

Justice Ginsburg has noted the "rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *Id.* (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (Becker, J., concurring); *see also Cicio v. Does*, 321 F.3d

83, 106-07 (2d Cir. 2003) (Calabresi, J., dissenting in part) (calling for this Court to "start over" in its analysis of the availability of consequential damages under ERISA), *vacated*, 542 U.S. 933 (2004). In the current "untenable" situation, broad preemption of state-law claims couples with the cramped *Mertens* interpretation of Section 502(a)(3) to produce rights without remedies. *Davila*, 542 U.S. at 222; *see also Allinder v. Inter-City Prods. Corp. (USA)*, 152 F.3d 544, 553 (6th Cir. 1998), *cert. denied*, 525 U.S. 1178 (1999) (noting "betrayal without a remedy" under *Mertens*). As a result, "[j]udicial and scholarly concern could hardly be higher." *Eichorn*, 489 F.3d at 593 (Ambro, J., concurring) (footnotes omitted) (collecting authorities).

Great-West and the profusion of conflicting lower-court decisions pre- and post-dating them demonstrate the imprudence of the *Mertens* Court's departure from the trust-law paradigm. The ahistorical distinction between equitable relief and money damages,[10] the artificial characterization of monetary relief as "instatement" or reinstatement into a plan, and the confusion of equitable with legal restitution have created what the Seventh Circuit has called a "morass" for courts and parties attempting to apply Section 502(a)(3). *See Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005).

The trust-law tradition that Congress invoked in drafting ERISA unquestionably provided for make-whole monetary relief against breaching fiduciaries, as the

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[10] "[I]t may once have been technically correct to say that damages were exclusively a common law remedy, but only because damages in equity were called surcharge." Langbein at 1353.

Mertens court acknowledged. *Mertens,* 508 U.S. at 256. Nothing suggests that Congress intended to depart from this tradition in creating ERISA's enforcement scheme. This Court should overrule *Mertens* to bring its interpretation of Section 502(a)(3) in line with Congressional intent and all other areas of ERISA jurisprudence, which acknowledge the trust-law basis of the statute.

Respectfully submitted,

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JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Pension Rights Center submits this brief *amicus curiae* in support of the petitioner in *LaRue v. DeWolff*, No. 06-856. Petitioner has given blanket consent to any person seeking to file an *amicus* brief. Written consent to file this brief has been obtained from the respondents and their letter is filed with this brief pursuant to Rule 37.2(b) of the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1976, after the enactment of the Employee Retirement Income Security Act ("ERISA"), the Pension Rights Center is a Washington, D.C. non-profit, consumer organization which has as its mission the protection and promotion of retirement security for workers, retirees and their families. For over thirty years, the Center has provided legal representation, informal assistance, and information to tens of thousands of participants and beneficiaries seeking to recover pension and 401(k) benefits and ensure that their plans are prudently managed. The resolution of the first question presented in the petition will have an impact on the Center's ability to help employees and retirees enforce their rights.

[1] Pursuant to Rule 37.6 of the Rules of this Court, the Center states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

ERISA was passed in 1974 in response to a growing concern that American workers were not receiving the pension benefits that they were promised. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-75 (1980) ("One of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated."). Congress found, among other things, that "the soundness and stability of plans with respect to adequate funds to pay promised benefits" were endangered. ERISA § 2(a), 29 U.S.C. § 1001(a). "Congress wanted to correct this condition by making sure that if a worker has been promised a [] pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – -he actually will receive it." *Nachman*, 446 U.S. at 375.

ERISA protects "the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal Courts." ERISA § 2(b), 29 U.S.C. § 1001(b). The fiduciary standards found in section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), impose upon fiduciaries the duty of loyalty and the duty of care, which have been described as among the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982); *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984). The duty of loyalty requires each fiduciary to act with "complete and undivided loyalty to the beneficiaries of the trust" and with an "eye single to the interests of the participants and beneficiaries." *Id.* The duty of care

requires each fiduciary to act with the "care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters" would employ. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

ERISA provides a comprehensive remedial scheme to enforce these stringent fiduciary responsibilities owed to participants and beneficiaries. Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), allows participants to bring suit for relief under section 409 of ERISA, 29 U.S.C. § 1109, including recovery of losses to the plan resulting from fiduciary breaches and other equitable and remedial relief as the court may deem appropriate.

The court of appeals erred when it held that a participant in a 401(k) plan cannot sue under sections 409 and 502(a)(2) for losses resulting from the alleged failure of a fiduciary to follow the participant's directions with respect to investment of assets in his individual account. Based on its incorrect reading of this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the court of appeals held that the requested recovery of losses would not "benefit the plan as a whole" and, therefore, the petitioner could not bring a claim under sections 409 and 502(a)(2). This result is contrary to the express language of section 409 which permits the recovery of "any losses to the plan."

The court of appeals also misunderstood the nature of defined contribution plans. A defined contribution plan provides for an individual account for each participant, but the assets of the plan are required to be held in trust. The assets of the trust are allocated to individual participant accounts, but the participants do not have legal title to

those assets. Because the expenses of the trust are not only used to pay benefits, but also to pay administrative and other costs, relief that goes to a defined contribution plan, even if ultimately allocated to individual accounts, is relief that "benefits the plan as a whole."

If this Court determines that the relief sought here is not relief that "benefits the plan as a whole," it should reconsider the scope of its holding in *Russell*. The narrow issue before this Court in *Russell* was whether a participant was entitled to extra-contractual compensatory and punitive damages for improper or untimely processing of a benefit claim. It was not necessary for this Court to answer the broader question of whether section 409 is limited to relief to the plan. Section 409 may be read as allowing equitable or remedial relief for any fiduciary violation, not simply for violations that injure the plan. While the meaning and scope of "remedial relief" is not apparent from the statute or case law, Congress clearly intended it to include something other than either equitable relief, which it authorized in section 409, or legal relief, which it rejected. A sensible interpretation of "remedial relief," which would be consistent with ERISA's goals, would be any relief that corrected a wrong or redressed an injury, which would include make-whole monetary relief.

Defined contribution plans have become the primary means through which American workers supplement their social security income in retirement. If the court of appeals decision is allowed to stand, the retirement income of millions of Americans will be jeopardized because there will be no meaningful manner in which participants in such plans will be able to insure that their investment

choices are honored and their retirement income is secured.

ARGUMENT

I. SECTIONS 409 AND 502(a)(2) AUTHORIZE A PARTICIPANT IN A DEFINED CONTRIBUTION PENSION PLAN TO SUE TO RECOVER LOSSES TO THE PLAN CAUSED BY A FIDUCIARY BREACH EVEN THOUGH THE LOSSES WILL BE ALLOCATED TO THE PARTICIPANT'S INDIVIDUAL ACCOUNT.

1. Section 502(a)(2) of ERISA provides that a civil action may be brought by a participant for "appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). The petitioner seeks approximately $150,000 restored to his defined contribution plan for losses allegedly caused by a fiduciary's failure to invest plan assets in his account according to his directions. He specifically requests an order requiring the fiduciary to reimburse to the plan amounts necessary so that his interest in the plan is what it should have been, but for the breach of fiduciary duty. Because the petitioner is seeking recovery of a loss to the plan resulting from a fiduciary breach that will then be allocated to his account, he has a claim under the plain language of sections 409 and 502(a)(2) of ERISA.

Contrary to the court of appeals decision, section 409 does not limit relief against a fiduciary to a narrow category of cases where the breach impacts every plan participant and the recovered losses go to every (or even most) plan participants. Consistent with ERISA's broad remedial goals, section 409(a) broadly states that a fiduciary who breaches "*any* of the responsibilities, obligations, or duties imposed upon fiduciaries shall be personally liable . . . [for] *any* losses to the plan resulting from *each* such breach." 29 U.S.C. § 1109(a) (emphasis added). On its face, the statute does not require that the losses be paid "for the benefit of the plan as a whole."

But even if section 409 requires that the recovery benefit the plan as a whole, the relief requested by the petitioner meets this requirement. The petitioner is a participant in a defined contribution pension plan. Under section 3(34) of ERISA, a defined contribution pension plan is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). The assets of defined contribution plans are required to be held in trust by one or more trustees who have authority and discretion to manage and control the assets of the plan. ERISA § 403(a), 29 U.S.C. § 1103(a).

A defined contribution plan may permit the participant to direct the investment of assets allocated to his or her account, but the participant does not have legal title to the assets. *See* Rev. Rul. 89-52, 1989-1 C.B. 110 ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance

will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will.") (citation omitted). The participant's "account" in a defined contribution plan is simply a bookkeeping entry in which certain assets of the plan are allocated to the participant. "[T]he sum of all the account balances . . . equals the total market value of the plan's assets." Dan M. McGill, *Fundamentals of Private Pensions* 247 (7th ed. 1996). As one noted commentator on ERISA has pointed out, "[i]n [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts." Dana Muir, *ERISA & Investment Issues*, 65 Ohio St. L.J. 199, 235 (2004). Thus, a loss to an individual account in a defined contribution pension plan is a corresponding loss to the plan "as a whole" and is recoverable under sections 409 and 502(a)(2), even if this Court reads the words "as a whole" into the statute.[2]

What the plan is owed and what any given participant should have allocated to his account as a result of a

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[2] *See Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995) ("Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as 'the highest known to law.' "); *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231, 235 (3d Cir. 2005) ("the fact that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003) (clarifying that a claim for losses relating to financial mismanagement is properly brought under section 502(a)(2) even if the relief ultimately flows to individuals).

recovery for a fiduciary breach in a 401(k) plan are actually two distinct questions. The plan assets held in trust are used to pay benefits, but are also used to defray expenses of operating the plan, including expenses for recordkeeping, auditing, annual reporting, claims processing and other administrative expenses. So even here, where the complaint alleges losses resulting from the failure to follow a single participant's instructions, the injury to the plan affects every account. If the plan had more money from the date of the breach, each participant's account would have suffered a slightly lower percentage charge to pay plan wide expenses. Consequently, if the instant suit is successful, the fiduciaries of the plan must allocate the recovery, taking into consideration the interests of all participants in the plan. How they should do so is not before the court, though as a theoretical matter, an improper allocation could be challenged in a subsequent action that would be purely equitable.

2. This interpretation of sections 409 and 502(a)(2) is consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). In *Russell* a participant's disability benefits were terminated by the plan's disability committee and then later reinstated. The participant brought suit, alleging that "[t]he interruption of benefit payments . . . forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused [the participant's] back ailment." *Id.* at 137. She brought suit under section 502(a)(2) seeking punitive damages and damages for mental or emotional distress, to be paid directly to her. *Id.* at 138. This Court held that the participant did not have standing to seek extra-contractual

compensatory or punitive damages for improper or untimely processing of a benefit claim under sections 409 and 502(a)(2) of ERISA. Noting that section 502(a)(1)(B) governs benefit claims, this Court stated "that recovery for a violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140.

By stating that recovery under section 409 inures to the benefit of the plan as a whole, *Russell* was simply distinguishing a claim seeking relief to be paid directly to an individual participant from relief to be paid directly to the plan. *Russell* acknowledged that "the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan." *Russell*, 473 U.S. at 142. This Court explained, however, that section 503 of ERISA, 29 U.S.C. § 1133, protects participants from untimely and improper benefit determinations and section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), authorizes a beneficiary to enforce her rights under a plan. *Russell*, 473 U.S. at 143-44. Neither of those sections provided for extra-contractual compensatory or punitive relief.

In contrast to these claims authorized by sections 502(a)(1)(B) and 503 of ERISA, this Court observed that the focus of section 409 was on the overall management of the plan and the investment of plan assets rather than on the participant's benefit claim. This Court explained that "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Russell*, 473 U.S. at 142-43. Surveying the legislative history, this Court found that

the floor debates revealed "that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." *Id.* at 140 n.8. This Court concluded that "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.* at 142.

It is entirely consistent with *Russell* to hold that a participant has a cause of action against a fiduciary under sections 409 and 502(a)(2) for losses resulting from the failure to follow the participant's directions in a 401(k) plan. 29 U.S.C. § 1109, 29 U.S.C. § 1132(a)(2). As *Russell* pointed out, the primary concern of Congress in section 409 was to protect plan assets in order to insure that retirement benefits will ultimately be paid. At the time *Russell* was decided, 401(k) plans were in their infancy, *see infra* at 11-12, and the language of *Russell* reflected the more common situation in defined benefit plans where a participant's retirement benefit was dependent on the financial solvency of the plan's entire investment portfolio (the plan as a whole). In 401(k) plans, a participant's retirement benefit is dependent on the performance of the investment options the participant chooses and not the plan's entire investment portfolio. But there is no reason to believe that Congress intended to provide less protection for participants who depend on only a portion of a plan's investment portfolio for retirement benefits than for those who depend on a plan's entire investment portfolio for those same benefits. Nor is there any reason to believe that this court in *Russell* meant to imply that ERISA provided

diminished protection for 401(k) plan participants, when nothing in the case required this Court even to consider the relief available to participants in such plans.

To read *Russell* as simply distinguishing a claim seeking relief to be paid directly to an individual participant from relief to be paid directly to the plan is supported by this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). *Varity* contrasted the various enforcement provisions contained in section 502, noting that each served a specific purpose. Section 502(a)(1)(B) provides relief "that runs directly to the injured beneficiary" with respect to benefit claims. *Varity*, 516 U.S. at 512. Section 502(a)(2), on the other hand, provides the enforcement provision for "fiduciary obligations related to the plan's financial integrity," *id.* at 512, in accordance with "a special congressional concern about plan asset management" reflected in section 409, *id.* at 511. Finally, turning to sections 502(a)(3) and (5), 29 U.S.C. § 1132(a)(3) and (5), *Varity* held that these sections are "catchall" provisions which could "include an award to 'participants and beneficiaries', rather than to the 'plan,' for breach of fiduciary obligation." *Id.* at 510-11. Thus, *Varity* clarifies that *Russell's* reference to relief to "the plan as a whole," *id.* at 522, simply stands for the proposition that relief under sections 409 and 502(a)(2) must be paid to the plan rather than directly to a participant.

3. This interpretation of section 409 and 502(a)(2) is necessary in order to protect the retirement security of American workers, the primary goal of ERISA. Although 401(k) plans did not come into general use until 1981, they have become the most common employer-sponsored retirement plan in the United States, having more active participants and about as many assets as all other private

pension plans combined. *401(k) Plans: A 25-Year Retrospective*, Research Perspective (Inv. Co. Inst., Washington, D.C.), Nov. 2006, at 1-2, http://ici.org/statements/res/per12-02.pdf. As of 2005, 401(k) plans held $2.4 trillion in assets and covered 47 million active participants. *Id.* at 3.[3]

Workers in 401(k) plans have individual accounts which are funded by employee contributions and usually include a matching or other contribution by the employer. *401(k) Plan Asset Allocation, Account Balances, and Loan Activity*, Perspective (Inv. Co. Inst., Washington, D.C.), Jan. 1999 at 3, http://ici.org/statements/perspective/per05-01.pdf. Usually, a 401(k) plan offers participants an array of investment options, and participants choose the options in which money allocated to their accounts will be invested. *Id.* Unlike the benefit provided by a defined benefit plan, which is specific and guaranteed by the Federal government, the retirement benefit a worker receives from a 401(k) plan depends on the amounts contributed to the plan and the returns on the investments chosen by the worker. Pension Benefit Guar. Corp., *A Predictable Secure Pension for Life, Defined Benefit Pensions*, Jan. 2000 at 2-6. Because the participant does not hold title to the assets in his account, he must rely on plan fiduciaries to follow his investment directions and make any requested transfers. If a 401(k) plan meets the requirements of section 404(c) of ERISA, 29 U.S.C. § 1104(c), the plan fiduciary is

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[3] 401(k) plans are one of several types of defined contribution plans. At the current time, defined contribution plans overall hold approximately $3.2 trillion in assets. *See* Bd. of Governors of the Fed. Reserve Sys., Statistical Release Z.1, *Flow of Funds Accounts of the United States: Flows and Outstandings, Fourth Quarter 2006*, Mar. 8, 2007 at 113.

not liable for any losses caused by the participant's investment decisions.[4]

The failure to follow the petitioner's "own particular instructions," as the court of appeals described the alleged violation, was not a breach of a duty "owed solely" to the petitioner. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 574 (4th Cir. 2006). In describing the duties fiduciaries owed to plans in *Russell*, this Court stated that "[t]he principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Russell*, 473 U.S. at 142-43. It is of fundamental importance to the retirement security of all plan participants in a 401(k) plan that fiduciaries have systems in place to promptly transfer assets from one investment to another at the request of a participant. Department of Labor regulations require a plan intending to qualify as a 404(c) plan to allow participants to transfer assets in their account into and out of the various plan investment options with a frequency that is reasonable in light of the market volatility of those investment options. 29 C.F.R. § 2550.404c-1. Most 401(k) plan participants are permitted to make daily transactions in their plans. *The Economics of Providing 401(k) Plans:*

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[4] Under section 404(c) of ERISA, 29 U.S.C. § 1104(c), employers are exempted from liability for investment losses when a plan participant exercises control over assets in his account "as determined under regulations of the Secretary [of Labor]." The regulations, issued in 1992, generally require 401(k) plans to afford participants certain opportunities, satisfy certain disclosure requirements, offer certain categories of investments, and refrain from prohibited transactions. *See* 29 C.F.R. § 2550.404c-1.

Services, Fees, and Expenses, Research Fundamentals (Inv. Co. Inst., Washington, D.C.), Nov. 2006 at 3, n.6, http://www.ici.org/pdf/fm-v15n7.pdf. The underlying purpose of these transfer rules is to allow plan participants to minimize large investment losses by quickly transferring out of sinking investments. The transfer rules have no meaning if plan fiduciaries cannot be held liable for the failure to follow plan participants' investment directions.[5]

Notwithstanding the fear expressed by the court of appeals, *LaRue*, 450 F.3d at 577, making fiduciaries liable for losses resulting from the failure to follow participant directions is unlikely to deter plan formation or the service of qualified individuals and institutions as fiduciaries. Congress sought to encourage the formation of employee benefit plans, in large part, by establishing the regulation of such plans "as exclusively a federal concern" and preempting state and local laws that would subject them to conflicting administrative and financial burdens, including state law remedies that were available to participants before ERISA was enacted. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). Congress, however, also imposed on fiduciaries the substantive duties of loyalty and care and provided a cause of action in sections 409 and 502(a)(2) of ERISA for the recovery of losses caused by fiduciary breaches that put employees' retirement security at risk.

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[5] A 401(k) plan fiduciary has a duty to prudently select and monitor those who provide administrative services to the plan, including the service provider responsible for processing participant transactions. *See* 29 C.F.R. § 2509.75-8, FR-14, 29 C.F.R. § 2509.96-1(e) (1999); Advisory Council on Employee Welfare & Pension Benefit Plans, U.S. Dep't of Labor, *Report of the Working Group on Guidance in Selecting and Monitoring Service Providers*, at 2-6 (Nov. 13, 1996); 97-16A Op. Pension & Welfare Benefits Admin. (May 22, 1997).

Giving effect to the text of sections 409 and 502(a)(2) that authorizes the recovery of "any" losses to the plan caused by "any" fiduciary breach implements the balance struck by Congress. 29 U.S.C. § 1109, 29 U.S.C. § 1132(a)(2).

One of the primary factors motivating employers to offer 401(k) plans is the need to attract and retain qualified workers with competitive compensation packages. *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, Research Fundamentals (Inv. Co. Inst., Washington, D.C.) at 1. Workers who participate in 401(k) plans contribute a portion of their salaries to those plans and receive matching contributions from their employers as part of their compensation package. Pension Benefit Guaranty Corporation, *A Predictable Secure Pension for Life, Defined Benefit Pensions*, at 6. In many 401(k) plans, the participants share the cost of plan administration, including costs associated with transferring assets from one investment option to another. *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, Research Fundamentals (Inv. Co. Inst., Washington, D.C.) at 4-5. Employees contribute their own money and participate in 401(k) plans based on the understanding that the plans are administered by fiduciaries who are acting prudently and solely in their interest. To hold that plan fiduciaries are not liable for fiduciary breaches that cause losses to participants' accounts and the plan as a whole would seriously undermine the confidence workers have in these plans to provide for their retirement security.

II. THIS COURT'S HOLDING IN *RUSSELL* DOES NOT FORECLOSE RECOVERY OF LOSSES TO PARTICIPANTS UNDER SECTIONS 409 AND 502(a)(2), AND, IF IT DOES, THIS COURT SHOULD RECONSIDER *RUSSELL*.

1. This Court in *Russell* held that sections 409 and 502(a)(2) do not authorize an action for extra-contractual and compensatory relief against a fiduciary for improper or untimely handling of a disability benefit claim. At the time *Russell* was decided, this Court had not yet considered the scope of the remaining remedial provisions of section 502 of ERISA. As the concurring opinion noted, "[t]his case presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty." *Russell*, 473 U.S. at 149 (Brennan, J., concurring). The concurring opinion also noted that "since § 502(a)(3) already provides participants and beneficiaries with 'other appropriate equitable relief . . . to redress violations,' there is no reason to construe § 409 expansively in order to bring these individuals under the penumbra of 'equitable or remedial relief.'" *Id.* at 150.

Since that time, this Court has construed the "appropriate equitable relief" provision of section 502(a)(3) narrowly, in actions brought against non-fiduciaries, to include only those remedies that were "typically available in equity" and not damages. Although this Court has not considered the scope of "appropriate equitable relief" under section 502(a)(3) in an action brought against a fiduciary until this case, the lower courts have almost unanimously held that make-whole relief against a breaching fiduciary is not available under that section. In

doing so, courts have suggested that this Court reconsider the scope of relief available in section 502 in order to provide the protections to participants and beneficiaries that Congress intended. *See, e.g., DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 422, 453 (3d Cir. 2003) (Becker, J., concurring); *Cicio v. Does 1-8*, 321 F.3d 83, 105 (2d Cir. 2003) (Calabresi, J., dissenting), *vacated*, 542 U.S. 933 (2004).

If this Court determines that make-whole relief against a breaching fiduciary is not available under section 502(a)(3) of the Act, this Court should limit its holding in *Russell* to the narrow issues presented by that case, *i.e.*, that extra-contractual remedies are not available for the improper and delayed handling of a benefit claim, and should reconsider the scope of sections 409 and 502(a)(2).[6] As this Court stated in *Russell*, ERISA has an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Russell*, 473 U.S. at 146 (quoting *Nachman*, 446 U.S. at 361). Thus, in construing sections 409 and 502(a)(2) this Court should not look at those

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[6] The Center agrees with the petitioner that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a participant to bring suit against a fiduciary for make-whole relief. The Center, however, believes this Court need not reach the scope of section 502(a)(3) because the petitioner's cause of action is more appropriately brought under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), as seeking relief to the plan. Therefore, relief under the general "catchall" provisions of section 502(a)(3) will not be required except to the extent that it may be necessary to allocate the plan's recovery to the appropriate participant account. *Varity*, 516 U.S. at 515. ("Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'")

provisions in a vacuum, but should take into consideration the entire remedial scheme of section 502 and the purposes of the statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *Sutherland Statutory Construction* § 46:05 (5th ed. 1991) (a statute must be considered as a whole, not just the particular section in a vacuum).

2. Section 409 of ERISA provides:

> LIABILITY FOR BREACH OF FIDUCIARY DUTY.
>
> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of [ERISA] § 411.

29 U.S.C. § 1109.

In *Russell*, this Court stated that section 409 is limited to relief to the plan. In reaching that conclusion, this Court noted that the phrase "and shall be subject to such other equitable or remedial relief as the court may deem appropriate" must be read in the context of the earlier portion of section 409 which characterizes the fiduciary relationship as one "with respect to a plan" and speaks of

the potential liability of a fiduciary to make good "to the plan" any losses "to the plan." Reading these sections as a whole, this Court concluded that the phrase "other equitable or remedial relief" must be read as limited to such relief for the plan. *Russell*, 473 U.S. at 134.

It is far more plausible and consistent with cannons of statutory construction to read section 409 in the following manner: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate." *Id.* at 139. Under this reading of section 409, equitable and remedial relief are not limited to relief to the plan, but are also available to participants and beneficiaries who have been individually harmed by a fiduciary breach.

This reading of section 409 is supported by its grammatical structure. Grammatically, the three clauses of section 409(a) are separated by commas and by the word "and." 29 U.S.C. § 1109(a). If Congress had intended a list of parallel remedies, as suggested by the opinion in *Russell*, it would have followed the ordinary grammatical rules for setting out a list, setting off the first clause with a comma, and listing the final "equitable and remedial relief" clause after the word "and" with no comma at all. "The rule here is that the comma is correct if it can be replaced by the word *and* or *or*." Lynn Truss, *Eats, Shoots & Leaves* (Gotham Book 2003) at 83. But Congress adopted a structure that is utterly idiosyncratic when it instead separated each clause of section 409 by both a comma and the conjunction "and." This indicates that Congress was setting forth a list of discrete remedies, not in any way dependent on the others. For example, in *United States v.*

Ron Pair Enter., Inc., 489 U.S. 235, 242 (1989), this Court construed the phrase "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" as allowing interest on a claim independent of any agreement providing for reasonable fees, costs or charges. This Court stated:

> This reading is also mandated by the grammatical structure of the statute. The phrase 'interest on such claim' is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words 'and any.' As a result, the phrase 'interest on such claim' stands independent of the language that follows . . . The language and punctuation Congress used cannot be read in any other way. By the plain language of the statute, the types of remedies are distinct.

Id. at 241-42.

Similarly, the language and punctuation of section 409 mandate that the phrase "and shall be subject to such other equitable or remedial relief" provides for remedies that are distinct from the previous remedies outlined in section 409. ERISA § 409(a), 29 U.S.C. § 1109(a). Unlike the language describing the recovery of losses to the plan or restoration to such plan of any profits made by a fiduciary, the language authorizing equitable and remedial relief makes no reference to a plan. Thus, section 409 must be construed to create more general remedies for fiduciary breaches than for remedies only to the plan.

To read section 409 as limited to relief "to the plan as a whole" effectively adds language to section 409(a) to say "and shall be subject to such other equitable or remedial relief *for the benefit of the plan as a whole* as the court may

deem appropriate." *See Aronsen v. Crown Zellerbach,* 662 F.2d 584, 590 (9th Cir. 1981) ("It is consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency."); *see also Sutherland Statutory Construction* § 47:38 (6th ed. 2000). (Insertion of words in a statute is permissible but "it is utterly unwarranted unless the omission from . . . the text is plain.").

Section 409's reference to a fiduciary's duties "with respect to a plan" does not, as *Russell* suggests, indicate that Congress intended for section 409 relief to be limited to relief to the plan. ERISA § 409(a), 29 U.S.C. § 1109(a). Instead, that phrase is more naturally read to extend the fiduciary requirements, and thus the remedies for breach of those requirements, to all of a fiduciary's plan-related functions. *See Webster's Third New International Dictionary* 1934 (1986) (equating "respect to" with "regard or reference to" and "concerned with"). This Court has recognized that Congress intended for ERISA's fiduciary provisions to codify the strict duties of loyalty and care that traditionally applied to trustees under the common law of trusts. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 570-71 (1985). Although these provisions apply to a fiduciary's actions in managing the plan and its assets, under ERISA, as under the common law, the trustee's duties run directly to the beneficiary. *Russell*, 473 U.S. at 142 ("the fiduciary obligations of plan administrators are to serve the interest of the participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan"); *see also id.* at 152-53 (Brennan, J., concurring in the judgment) ("[I]t is black-letter trust law that fiduciaries owe strict

duties running directly to beneficiaries in the administration and payment of trust benefits."); Restatement (Third) of Trusts § 170(1) at 384 (1992) ("The trustee is under a duty to administer the trust solely in the interest of the beneficiary."). There is, therefore, no reason to read the phrase "with respect to a plan" as supporting an interpretation of section 409 that excludes relief to participants and beneficiaries.[7]

3. The phrase "equitable and remedial relief" should be construed to include make-whole relief to individuals who are harmed by fiduciary breaches. Because *Russell* held that section 409 did not provide a remedy for a participant alleging a fiduciary breach with respect to a benefit denial, this Court did not determine the meaning of the phrase "other equitable or remedial relief." Indeed, this Court expressly left open "any question concerning the extent to which § 409 may authorize recovery of extracontractual compensatory or punitive damages from a fiduciary by a *plan*." 473 U.S. at 144 n.12. Accordingly, if this Court determines that sections 409 and 502(a)(2) authorize a suit for individual relief, the question remains open whether make-whole relief for a participant or beneficiary against a breaching fiduciary is available.

---

[7] The committee reports stressed the importance of giving participants the ability to protect their own interests as well as the interest of the plan. *See* S. Rep. No. 93-127 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 ("without standards by which a participant can measure the fiduciary's conduct . . . he is not equipped to safeguard either his own rights or the plan assets"); *id.* at 4863 ("the safeguarding effect of the fiduciary responsibility section will operate efficiently only if the fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general").

Although this Court determined in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) that equitable relief does not include make-whole monetary relief (at least against a non-fiduciary), this Court should hold that make-whole relief is a form of "remedial relief" available under section 409. "Remedial relief" is not defined by ERISA, nor is the term commonly found in statutes or case law. "Remedial relief" must mean something other than "equitable relief," which the statute expressly authorizes, and it must mean something other than "legal relief," which Congress expressly omitted from section 502. "Remedial" is defined in *Black's Law Dictionary* as:

> **1.** Affording or providing a remedy; providing the means of obtaining redress <a remedial action>. **2.** Intended to correct, remove, or lessen a wrong, fault or defect <a remedial statute>. **3.** Of or relating to a means of enforcing an existing substantive right; procedural <a remedial right>.

Black's Law Dictionary 1296 (7th ed. 1999). Although *Black's Law Dictionary* does not define "remedial remedy," it does define "remedial law" as:

> **1.** A law providing a means to enforce rights or redress injuries. **2.** A law passed to correct or modify an existing law; esp. a law that gives a party a new or different remedy when the existing remedy, if any, is inadequate.

Id. "Remedial relief" in section 409 should, therefore, be broadly construed as relief that corrects a wrong or redresses an injury, which should encompass make-whole relief to a participant or beneficiary who suffers an injury as a result of a fiduciary breach. Such a reading would be

consistent with the statute's primary purpose of protecting participants and beneficiaries, but would exclude such legal relief as was designed to punish or deter rather than to correct a wrong, notably punitive damages.[8]

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[8] To be sure, the legislative history supports the view that in using the word "remedial" Congress meant "legal." Contrary to this Court's description of ERISA's legislative history in *Russell*, 473 U.S. at 145-46, it is clear that the "equitable or remedial" language adopted by the conference committee and passed by Congress was derived from prior House versions of the bill which became ERISA. *See* H.R. 9824, 84th Cong. (Aug. 2, 1973), *reprinted in* 1 *Legislative History of the Employee Retirement Income Security Act of 1974*, Pub. Law 93-406, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate (April 1976) ("Leg. Hist.") 731; H.R. 2 (Oct. 2, 1973), *reprinted in* 2 Leg. Hist. 2288; H.R. 2 (Mar. 6, 1974), *reprinted in* 3 Leg. Hist. 3952. Thus, the statement in H.R. Rep. No. 93-533 (Oct. 2, 1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655, that bill was authorizing "the full range of legal and equitable remedies available in both state and federal courts," quoted by the Court in *Russell*, *supra*, referred to the version of H.R. 2 of the same date which utilized the language "equitable or remedial." This was the language that was adopted in conference and from the legislative history that both Houses understood the bill to provide the "full range of legal and equitable remedies." Nevertheless, Congress's failure to use the word "legal" in the statute itself supports the view that "remedial" means something more than "equitable" but less than "legal."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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JAMES LaRUE,

Petitioner,

v.

DeWOLFF, BOBERG & ASSOCIATES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
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INTEREST OF AMICUS CURIAE[1]

The Self Insurance Institute of America, Inc. ("SIIA") is a non-profit corporation of nearly 1000 members, serving tens of millions of health plan beneficiaries, dedicated to the advancement and protection of the self-insurance industry. SIIA's membership includes self-insured entities such as employer plan sponsors, as well as service providers such as third-party administrators, reinsurance companies, and other entities that support the self-insurance business. SIIA is the only association in the United States that exclusively represents firms, professionals, and organizations that participate in the broad spectrum of self-insurance, including self-insured group health plans.

Through SIIA, its members coordinate their views and provide practical information and recommendations to government and the public on a range of subjects relevant to the effective functioning of the self-insurance system, including the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, that concern self-insured health plans and plan participants. SIIA's mission includes rendering assistance to courts in their deliberations on significant self-insured health plan issues of broad concern to its members. Indeed, SIIA has filed briefs as amicus curiae in previous ERISA cases before the Court. *See, e.g.*, Brief Amicus Curiae of Self-Insurance Institute of America, *FMC Corp v. Holliday*, No. 89-1048 (filed Jan. 26, 1990); Brief Amicus Curiae of Self-Insurance Institute of America, *Great-West Life & Annuity Insurance Co. v. Knudson*, No. 99-1786 (filed May 10, 2001); Brief Amicus Curiae of Self-Insurance Institute of America, *Sereboff v. Mid Atlantic Medical Serv., Inc.*, No. 05-260 (filed Feb. 23, 2006).

SIIA has a strong interest in this case. The issues raised in this appeal concern the remedies available to both fiduciaries

[1] Amicus has sought and has obtained written consent from counsel to both parties to submit this amicus brief. Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, Amicus states that no counsel for a party has written this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

and participants in ERISA plans. SIIA believes that the availability of adequate equitable remedies is indispensable to the proper administration of ERISA plans, regardless of whether breaches by plan fiduciaries harm participants or plan providers. Indeed, if appropriate remedies are not available to both participants and plan providers, the integrity of plan assets will be compromised and, in turn, the well-being and security of the employee participants and their dependents will suffer. The decision of the Fourth Circuit undermines the security and stability that Congress intended to bring to employer-based retirement plans when it enacted ERISA. SIIA therefore submits this amicus brief in support of Petitioner to urge the Court to reverse the decision below.

INTRODUCTION

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Congress "wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (internal quotations omitted). ERISA is designed to prevent plans from becoming underfunded because of mismanagement, waste, or conversion of plan funds. This Court, honoring the fundamental aim of the statutory regime, thus has held plan participants to their equitable duty under ERISA to restore funds that rightfully belong to the plan. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006). This obligation to restore plan funds should apply with equal force to plan fiduciaries. *See Peckham v. Gem State Mut.*, 964 F.2d 1043, 1051 (10th Cir. 1992) ("A single miscue by a plan agent could result in a modification of the plan in a way that might leave it radically underfunded.").

Section 404 of ERISA imposes substantial legal and equitable duties on plan fiduciaries. 29 U.S.C. § 1104. Section 409 of ERISA provides a remedy for breach of these duties, holding the fiduciary personally liable "to make good to such plan any losses to the plan resulting from each such breach" and, inter alia, allowing for other "equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary." *Id.* § 1109(a). Section 502 of ERISA, in turn, provides the vehicle for judicial relief. Section 502(a)(2) authorizes participants, beneficiaries, and other plan fiduciaries to bring civil actions against plan fiduciaries that fail to meet their obligations under Section 409 of ERISA. *Id.* Section 502(a)(3) more broadly authorizes a "participant, beneficiary, or fiduciary" to obtain "appropriate equitable relief" to "enforce any provision of . . . the terms of the plan." *Id.* § 1132(a)(3).

Here, Petitioner alleged that Respondent failed to honor his investment wishes in violation of Section 404 of ERISA, resulting in a loss of nearly $150,000.00 to his individual plan account. Petitioner thus brought claims under Section 502(a)(2) and Section 502(a)(3) to require the plan fiduciary to restore the funds to the plan in accordance with Section 409 of ERISA. The Fourth Circuit rejected both claims. *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (2007). The ruling below was incorrect for several reasons and should be reversed.

First, Petitioner's claim falls comfortably within the ambit of Section 502(a)(2). Petitioner is a "participant" who brought a suit to require the plan fiduciary to "make good" on "losses to the . . . plan" that resulted from a breach of fiduciary duty. *See, e.g., Milofsky v. Am. Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006) (en banc). Put simply, Section 502(a)(2) entitles "individual-account-plan participants not only to what *is* in their accounts, but also to what *should* be in there given the terms of the plan and ERISA's fiduciary obligations." *Graden v. Conexant Sys., Inc.*, — F.3d —, No. 06-2337, 2007 WL 2177170, at *3 (3d Cir. July 31, 2007). The Fourth Circuit rejected this argument

because, in its view, Section 502(a)(2) "requires" a plaintiff's "individual remedial interest [to] serve as a legitimate proxy for the plan in its entirety." *LaRue*, 450 F.3d at 574. The Fourth Circuit's interpretation is mistaken.

This Court has made clear that a plan fiduciary may not be held "personally liable to a plan participant" in tort for extracontractual damages. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 136 (1985). *Russell* explained that "Congress did not intend" for Section 409 "to authorize relief except for the plan itself." *Id.* at 144. Despite the Fourth Circuit's conclusion to the contrary, Petitioner's claim seeks recovery that inures to the benefit of the plan. The recovery will not only restore funds to the individual plan account, but also will defray overhead and other administrative costs that are shared among all participants in this unitary trust. *See, e.g.*, *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 235 n.4 (3d Cir. 2005). Moreover, the Fourth Circuit's attempt to distinguish between individual suits, which were precluded in its view, and suits on behalf of a "subset" or "subclass" of participants, which were not, is illegitimate. Such distinctions find no support in the text of Section 502(a)(2) and would relieve plan fiduciaries of liability so long as their breaches are confined to small group of plan participants. This cannot be the law.

Second, consistent with this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), Petitioner stated a claim for "appropriate equitable relief" under Section 502(a)(3). Whether the remedy sought is "equitable" turns on whether the relief was "typically available in equity" at the time of the divided bench. *Id.* at 256. The relief sought here—a "surcharge" against the fiduciary—is unquestionably equitable relief under Section 502(a)(3). Surcharge is an equitable remedy that holds a "trustee who commits a breach of trust . . . chargeable with the amount required to restore the values of the trust estate and trust distributions to what the would have been if the trust had been properly administered." RESTATEMENT (THIRD) OF TRUSTS § 205 (1992). Thus, the surcharge remedy is not the imposition

of money damages; it is an "equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." *In re Scheidmantel*, 868 A.2d 464, 492-93 (Pa. Super. Ct. 2005); *see also* 11 U.S.C. § 543(c)(3) (including surcharge as equitable remedy under bankruptcy law).

The Fourth Circuit improperly read this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), which addressed whether restitution was a legal or equitable remedy, to foreclose this result. In resolving this question, the Court concluded that restitution could be both legal and equitable and, in order to draw a "fine distinction" between the two, found that the remedy was equitable where the plaintiff sought to recover particular funds or property in the defendant's possession. *Id.* at 212-14. The Fourth Circuit thus mistakenly turned a rule designed to distinguish between legal and equitable restitution into a rule of general applicability. As this Court more recently explained, "there was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity." *Sereboff*, 126 S. Ct. at 1876. Respondents' argument that relief is unavailable unless the specific funds can be traced to an account in their possession thus is unavailing.

Last, the Fourth Circuit completely ignored the statutory scheme to reach a result that cannot be squared with the overarching purpose of ERISA. Congress sought to reassure plan participants that their investments were secure, in part, by imposing personal liability on fiduciaries that breach their obligations under ERISA. The decision below undermines this important statutory objective by leaving plan participants without a remedy unless the fiduciary commits a massive breach. The Fourth Circuit's rule also will prevent plan administrators and the federal government from imposing liability on fiduciaries. Plan participants, beneficiaries, co-fiduciaries, and the federal government are all treated alike under Section 502(a)(2). Moreover, the distinction the Fourth Circuit seemingly draws between individual suits and "subclass" suits will prove judicially unmanageable. The Fourth Circuit's ruling, if adopted, therefore would serve as a major obstacle to ensuring plan solvency.

In addition, the imposition of possession and/or traceability requirements in the circumstances presented here would allow breaching plan participants and fiduciaries to continue to manipulate and withhold plan funds in dereliction of their contractual and equitable obligations. *See, e.g.*, *Sec. Mut. Life Ins. Co. of N.Y. v. Joseph*, No. CIV A 06-CV-4804, 2007 WL 1944345 (E.D. Pa. July 2, 2007). ERISA was enacted to protect participants and beneficiaries and to make certain that plans were no longer underfunded. Recovery of funds that rightfully belong to the plan is crucial to fulfilling this mandate. Accordingly, any ruling that allows those who owe contractual and equitable duties under ERISA to escape liability because they have converted or dissipated plan funds cannot be squared with the purpose and meaning of Section 502(a)(3).

ARGUMENT

I. SECTION 502 OF ERISA AFFORDS PLAN PARTICIPANTS AN EQUITABLE REMEDY FOR BREACH OF FIDUCIARY DUTY.

A. Section 502(a)(2) Authorizes Individuals to Recover Losses to Defined Contribution Plans That Result From a Breach of Fiduciary Duty.

Section 502(a)(2) of ERISA authorizes a plan "participant" to bring suit for "appropriate relief" under Section 409 of ERISA. 29 U.S.C. § 1132(a)(2). Section 409, in turn, requires a plan fiduciary to "make good" to the plan "any losses to the plan" resulting from a breach of "any of the responsibilities, obligations, or duties imposed" upon fiduciaries by ERISA. *Id.* § 1109(a); *see also id.* § 404(a)(1) (mandating that a plan "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries"); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298 (3d Cir. 1993) ("ERISA trustees must act in the interest of the employee benefit plans they serve; their duties and powers reflect Congress' policy of assuring the equitable character of the plans, and they are held accountable to the plans for their breaches." (internal citations and quotations omitted)).

Here, Petitioner has alleged that the plan fiduciary failed to invest plan assets as instructed. *See LaRue*, 450 F.3d at 572. Petitioner has further alleged that this failure constituted a breach of fiduciary duty and thus a violation of Section 502(a)(2). *Id.* ("According to the complaint, his 'interest in the plan ha[d] been depleted approximately $150,000.00' as a result of defendants' failure to follow his instructions.").

Petitioner's claim is expressly authorized under Section 502(a)(2). Petitioner is a "participant" who has brought a suit to require the plan fiduciary to "make good" on "losses to the plan" that resulted from a breach of "duties imposed" by ERISA. *See, e.g.*, *Milofsky*, 442 F.3d at 313 (finding that a "subset of participants" in an ERISA plan are "entitled" to press breach of fiduciary duty claims under § 502(a)(2)); *In re Schering-Plough Corporation ERISA Litigation*, 420 F.3d at 235 ("Section 1109 allows the Plan to recover '*any losses*' from a breach of fiduciary duty." (emphasis added)); *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003) (stating that participants in ERISA plan charging breach of fiduciary obligation could "clearly" bring suit under section 502(a)(2) because plaintiffs were seeking to have trustees reimburse the plan as relief "expressly authorized" by Section 409(a)); *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995) (holding that "a subclass of Plan participants may sue for a breach of fiduciary duty" and seek recovery to the Plan under Section 502(a)(2)). As one court explained, "ERISA entitles individual-account-plan participants not only to what *is* in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations." *Graden*, 2007 WL 2177170, at *3.

The Fourth Circuit acknowledged that Petitioner seeks a recovery that would be paid into his plan account, but nevertheless rejected the claim. *See LaRue*, 450 F.3d at 574 ("To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan."). The Fourth Circuit thus held that Section 502(a)(2) "requires" a plaintiff's "individual remedial interest [to] serve as a

legitimate proxy for the plan in its entirety," and determined that Petitioner's claim did not meet this criterion. *Id.* The Fourth Circuit's conclusion, however, is premised on the erroneous assumption that Section 502(a)(2) does not provide a remedy for harm caused to an individual plan account by a breach of fiduciary duty unless a critical mass of individual plan participants have suffered the same fate. *See id.*

To reach this result, the Fourth Circuit misread this Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). *Russell* involved a plan participant who attempted to file suit under ERISA for compensatory and punitive damages relating to an alleged wrongful denial of benefits. *Id.* at 136-37. The Ninth Circuit held that Sections 409(a) and 502(a)(2) of ERISA authorized compensatory and punitive damages. *Id.* at 137-38. The *Russell* Court granted certiorari and reversed that decision. *Id.* at 138. As the Court explained, "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Id.* at 142-43. The Court found, however, that Section 502 "says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim." *Id.* at 144.

At bottom, *Russell* considered whether a fiduciary could be held "personally liable to a plan participant" in tort. *Id.* at 136. The Court held that the plaintiff could not recover damages for pain and suffering because the recovery was not for the plan, but was to be directly payable to the plaintiff. *See id.* at 144 ("Congress did not intend [Section 409] to authorize any relief except for the plan itself"). The Court reasoned that Section 409 emphasized the relationship between the fiduciary and the plan, requiring recovery to go to the plan. *Id.* at 140. Thus, the "reference in [Section] 409 to 'such other equitable or remedial relief as the court may deem appropriate'" had to be read in light of the requirement that "recovery for a violation of [Section] 409 inures to the benefit of the plan as a whole." *Id.*

The narrow holding in *Russell* therefore is limited to circumstances in which a plaintiff seeks personal recovery, payable directly to herself rather than to the plan in the first instance. *See, e.g.*, *Lively v. Dynegy, Inc.*, 420 F. Supp. 2d 949, 953 (S.D. Ill. 2006) ("[T]he Supreme Court, in *Russell*, simply limited the relief available under section 409 to relief that is directed to the plan rather than to individual participants."); *Kling v. Fid. Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 126 (D. Mass. 2003), *review granted in part, decision modified on other grounds*, 291 F. Supp. 2d 1 (D. Mass. 2003) (finding that even though "the harm alleged [does] not affect every single participant does not alter th[e] conclusion" that the plaintiff's suit "on behalf of the Plan . . . meets the requirements of [Section] 409 as interpreted by the Supreme Court in *Russell*"); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1414 (9th Cir. 1988) (noting that *Russell* held "that § 409(a) may not be used to award extracontractual compensatory or punitive damages to an ERISA plan beneficiary when a fiduciary mishandles the beneficiary's claim to benefits").

The case at bar is markedly different. Here, Petitioner is requesting recovery for losses to the plan. Indeed, the recovery will be paid to the plan, not to Petitioner. *See* Petition for a Writ of Certiorari at 6, 14, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (filed Nov. 6, 2006) ("Pet. for a Writ of Cert."). That the plan is comprised of individual accounts and that individuals have rights of withdrawal is of no moment. A defined contribution plan is a unitary trust. *See Graden*, 2007 WL 2177170, at *2 (explaining that Section 502(a)(2) "merely codifies for ERISA participants and beneficiaries a classic trust-law process for recovering trust losses through a suit on behalf of the trust"); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d at 234-35 (endorsing plaintiffs' argument that "the Savings Plan was a unitary trust" and noting "that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"); *Lively*, 420 F. Supp. 2d at 953 (explaining that "all assets of an individual account pension plan are owned by the Plan, not the participants" and therefore

"Plaintiffs' contention that the Plan consists of a unitary corpus of trust assets in which only its trustee enjoys an ownership interest is persuasive and consistent with fundamental trust law"); RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining the concept of a trust and distinguishing between the person who "holds title" to trust property and the beneficiary of the trust). In short, "[w]hen a common-law trustee commits a breach of trust that results in a loss, any beneficiary whose beneficial interests were affected may sue to compel the trustee to make on the loss." *Graden*, 2007 WL 2177170, at *2 (citing RESTATEMENT (SECOND) OF TRUSTS § 214 & cmt. B. (1959)). "When the trustee does so, he restores money to the trust for the benefit of the plaintiff/beneficiary." *Id.* (citations omitted)).

If Petitioner prevails, his recovery will not only restore funds to Petitioner's individual account, but will defray overhead and other administrative costs associated with the plan. *See* Brief for the United States as Amicus Curiae at 6, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (filed May 18, 2007) ("U.S. Cert. Br."). To the extent that the plan allocates expenses on a pro rata basis, all plan participants benefit from an increase in an individual's account, because that individual will pay a higher proportion of the plan's administrative expenses.[2] *See* Employee

[2] That Petitioner is no longer a member of the plan does not change the result. Petitioner's recovery will still benefit the plan. *See, e.g., Harzewski v. Guidant Corp.*, 489 F.3d 799, 807 (7th Cir. 2007) (holding that a breach of fiduciary duty under ERISA "that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty"). As the Third Circuit recently explained, "once a participant takes a lump sum distribution of the *correct* amount, he has all of his vested benefits and may no longer sue for any alleged fiduciary breaches." *Graden v. Conexant Sys., Inc.*, 2007 WL 2177170, at *4 n.10 (3d Cir. July 31, 2007). "If, however, the lump sum were improperly calculated *or otherwise deficient*, then the participant would retain a claim for benefits and thus have standing to sue." *Id.* (citing *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 349-50 (5th Cir. 1989)). Here, (Cont'd)

Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003), *available at* http://www.dol.gov/ebsa/regs/fab_2003-3.html (discussing when it is appropriate to allocate plan administrative expenses on a per capita basis versus a pro rata basis); *see also Graden*, 2007 WL 2177170, at *2 ("[T]he plan takes legal title to any recovery, which then inures to the benefit of its participants and beneficiaries."); *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d at 235 n.4 ("[T]he recovery in this case would go to the Plan as a whole to be held in accordance with the terms of the plan, including the payment of operating expenses and the like, which would redound to the benefit of all participants."). Thus, even if Section 502(a)(2) is read to require that the relief sought benefit the plan as a whole, the recovery sought here certainly satisfies this command.

The Fourth Circuit also attempted to draw a distinction between the instant case and cases in which "an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants," *LaRue*, 450 F.3d at 574 (citations omitted), apparently reasoning that Section 502(a)(2) recognizes a cause of action for the latter because such claims serve as a "proxy" for the entire plan. *Id.* ("We are . . . skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as [Section 502(a)(2)] requires.").[3] To read Section 502(a)(2) to require that the

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Petitioner did not receive the "correct" amount from the plan and therefore remains entitled to relief under ERISA.

[3] In denying the Secretary of Labor's request for en banc review, the Fourth Circuit relied on dicta from a footnote in *Russell* to support its holding that a Section 502(a)(2) "claim must 'be brought in a representative capacity on behalf of the plan as a whole.'" *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359, 362 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (2007) (quoting *Russell*, 473 U.S. at 141 n.9). Here too, however, the court misread *Russell*. The *Russell* Court made this statement to draw a distinction between relief that inures solely to an individual—such as extracontractual compensatory damages—and relief that restores funds to the plan, whether the funds are commingled in a general fund or held in an individual account.

fiduciary breach harm every member of the plan—or a "subset" or "subclass" of plan participants—not only contradicts the text of the statute, as explained above, but draws a line that is both illogical and irreconcilable with the basic purposes of ERISA.

Specifically, the Fourth Circuit's decision does not explain how ERISA can be read to create a regime that insulates plan fiduciaries from liability so long as their unlawful conduct does not harm every member of the plan. ERISA plainly states that a "participant" may bring a civil action against a fiduciary for "any" breach, and that the fiduciary is personally liable to the plan for "any" losses to the plan. 29 U.S.C. §§ 1132(a), 1109(a). The Fourth Circuit, absent a massive breach by a plan fiduciary, has rendered this important remedy an empty promise for plan participants; a result that is fundamentally at odds with a core purpose of ERISA. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) ("In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."); *see also Russell*, 473 U.S. at 140 n.8 (explaining that "[t]he floor debate . . . reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future"); *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 454 (1st Cir. 1995) ("ERISA's substantive protections are intended to safeguard the financial integrity of employee benefit funds, to permit employee monitoring of earmarked assets, and to ensure that employers' promises are kept.").

And, limiting the Fourth Circuit's decision to a requirement that suit be brought by "a subset of participants," *Milofsky*, 442 F.3d at 313, or "only a subclass of the employee benefit plan's beneficiaries," *Kuper*, 66 F.3d at 1450, cannot square the circle.[4]

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[4] Insofar as parties and courts have an interest in economy and efficiency of proceedings, courts can require that all affected plaintiffs be joined in one proceeding, or that plaintiffs obtain class certification to represent others similarly situated. *See, e.g., Coan v. Kaufman*, 457

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The Fourth Circuit failed to explain why there is a meaningful distinction between a breach of fiduciary duty that affects some subset of employees and a breach that affects only one plan participant. Even more importantly, Respondents cannot offer a coherent explanation of how courts are to discern when the breaching fiduciary has injured a "significant" enough number of plan participants to form a critical mass, Brief in Opposition at 8, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (filed Jan. 22, 2007) ("Br. in Opp'n"), or how such an arbitrary rule comports with Congress's well-documented aims in enacting ERISA. *See, e.g., O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262, 266 (1st Cir. 2001) (explaining that the Supreme Court has "made clear that a given plan must be evaluated in light of Congress' purposes in enacting ERISA" and that "[p]aramount among those aims was to safeguard employee interests by reducing the threat of abuse or mismanagement of funds" (citations omitted)).

Simply put, the Fourth Circuit misread *Russell* and, in so doing, misconstrued Section 502(a)(2). By focusing on the (mistaken) conclusion that the breach of fiduciary duty injured Petitioner alone, rather than examining the nature of the remedy sought for the breach, the Fourth Circuit extinguished the ability of plan participants to recover under Section 502(a)(2) in a vast array of cases. The right to bring suit under Section 502(a)(2) does not depend on the number of plan participants wronged by the plan fiduciary. *See, e.g., Lively*, 420 F. Supp. 2d at 953 ("By its clear terms, section 409 requires fiduciaries to make good 'any losses' to the plan, not just losses that have an impact on every single participant of the plan."); *Kling*, 270 F. Supp. 2d at 126 (explaining that just because the harm "alleged did not affect every single participant does not alter" the availability of suit under Section 409).

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F.3d 250, 262 (2d Cir. 2006) (section 502(a)(2) claim dismissed because plaintiff failed to do anything to allow the court to "safeguard the interests of others or the court's proceedings"). Here, however, Petitioner has no other similarly situated plaintiffs to join.

Moreover, a plan participant's right to recovery under ERISA should not turn on ad hoc distinctions between "subsets" and "subclasses" of employees. The rule adopted by the Fourth Circuit creates a perverse system in which a fiduciary is relieved of personal liability for his breaches to the extent that he confines his misdeeds to actions that affect only a few plan participants, and regardless of whether the resulting injury is devastating. Properly construed, Section 502(a)(2) authorizes plan participants, such as Petitioner, to hold fiduciaries liable for breaches of their obligations, so long as recovery inures to the plan and not to the plaintiff. A judicial narrowing of the statute to shield fiduciaries who breach with respect to some (but not all) plan participants is unjustified and cannot be reconciled with the text and purpose of ERISA. The Fourth Circuit's decision rejecting Petitioner's Section 502(a)(2) claim as a matter of law should be reversed.

B. Surcharge of the Plan Fiduciary Is "Equitable Relief" Under Section 502(a)(3).

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a "participant, beneficiary or fiduciary . . . to obtain appropriate equitable relief" to "enforce any provision of . . . the terms of the plan." As this Court has explained, "appropriate equitable relief" includes "those categories of relief that were typically available in equity." *Mertens*, 508 U.S. at 256. In other words, "equitable relief" under Section 502(a)(3) "is to be construed by reference to the types of relief typically available in equity, and courts are to analyze the underlying nature of the claim and relief requested by a plaintiff in order to determine whether that relief has been typically available in equity." *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 211 (3d Cir. 2004) (internal quotations omitted); *Rego v. Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003) ("Under *Mertens*, then, the relevant question is not whether a given type of case would have been brought in a court of equity, but whether a given type of relief was available in equity courts as a general rule."). In most cases, "consulting . . . standard current works such as

Dobbs, Palmer, Corbin, and the Restatements" will "make the answer clear." *Knudson*, 534 U.S. at 217.

There can be no question that "surcharge"—the traditional equitable remedy analogous to the "make whole" relief sought by Petitioner here—is typically available in equity. *See* BLACK'S LAW DICTIONARY 1482 (8th ed. 2004) (defining a "surcharge" as the "amount that a court may charge a fiduciary that has breached its duty"); RESTATEMENT (THIRD) OF TRUSTS § 205 (1992) (explaining that "[a] trustee who commits a breach of trust is . . . chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered"). Thus, "[i]f the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach." *Id.* § 205, cmt. a.

Recognition of a surcharge remedy does not constitute the imposition of "money damages," *LaRue*, 450 F.3d at 575 (quoting *Mertens*, 508 U.S. at 256), on a plan fiduciary.[5] Rather, a surcharge is, by its nature, a uniquely equitable remedy: "A surcharge is the equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." *In re Scheidmantel*, 868 A.2d at 492-93; *see also In re Carter Paper Co., Inc. v. Schott*, 220 B.R. 276, 305 (Bankr. M.D. La. 1998) (explaining that surcharge is not a "legal judgment" but rather "is, by definition, an equitable remedy imposed against fiduciaries who willfully or negligently violate

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[5] The nature of the surcharge remedy is clearly distinguishable from the compensatory damages remedy that is available at law. *See* E. Daniel Robinson, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L. Rev. 1447, 1469 (2006) ("Surcharge provides only compensation for financial loss, requires proof of a precise amount of loss, and generally requires bad faith. In contrast, tort damages have a much larger scope—they often compensate for nonpecuniary losses." (citations and footnotes omitted)).

their duties" (citations omitted)); *Barker v. First Nat'l Bank*, 20 F. Supp. 185, 190 (N.D. Ala. 1937) (finding that "it would not be *equitable to impose a penalty by way of surcharge* where the bank sustains the very definite burden, which it must sustain, of showing that the trustee acted in good faith"). Because surcharge was exclusively available in equity at the time of the divided bench, *a fortiori* this remedy is "typically available in equity" as required under *Mertens*. *See LaRue*, 450 F.3d at 575 ("Determining the applicability of [Section 502(a)(3)] therefore requires a court to examine whether the form of relief a plaintiff seeks is, like an injunction, historically one that a court of equity rather than a court of law would have granted.").[6]

Indeed, Congress specifically identified surcharge as equitable remedy in the Bankruptcy Code. 11 U.S.C. § 543(c)(3) ("The court . . . shall . . . surcharge such custodian . . . for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved . . . by a court of competent jurisdiction before the commencement of the case under this title."). As one court has explained, "Section 543's approach . . . is consistent with the Bankruptcy Code's fundamental premise: that the bankruptcy court overseeing the entire bankruptcy proceeding is in the best position to evaluate all of the equitable factors required for fair adjustment of claims and interests." *In re Si Yeon Park, Ltd.*, 198 B.R. 956, 964 (Bankr. C.D. Cal. 1996). Bankruptcy courts have employed the surcharge remedy in other contexts as well. *See, e.g.*, *Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004) ("We hold that the bankruptcy court may *equitably surcharge* a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater

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[6] *See also Dunnigan v. Met. Life Ins. Co.*, 277 F.3d 223, 229 (2d Cir. 2002) ("[T]he mere fact that money is sought does not necessarily classify the relief as damages, rather than equitable relief."); *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 498 (7th Cir. 1999) ("But not all monetary relief is damages. Equity sometimes awards monetary relief, or the equivalent, and restitution is both a legal and an equitable remedy that is monetary yet is distinct from damages.").

than what is permitted by the exemption scheme of the Bankruptcy Code." (emphasis added)). It would violate settled rules of statutory construction to interpret the equitable provisions of ERISA and the Bankruptcy Code inconsistently. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Accordingly, for all the reasons identified above, surcharge easily qualifies as "appropriate equitable relief" under Section 502(a)(3). The Fourth Circuit disagreed, however, because it read *Knudson*, and the Court's more recent decision in *Sereboff*, 126 S. Ct. 1869, to preclude this result. *See LaRue*, 450 F.3d 575-77. According to the court, under *Knudson* and *Sereboff*, the "absence of unjust possession is fatal" to a Section 502(c)(3) claim. *LaRue*, 450 F.3d at 575; *id.* at 576 (concluding that the "Court in *Sereboff* reaffirmed the possession requirement it had announced in *Knudson*"). The Fourth Circuit mischaracterized the import of these cases and construed them far more broadly than this Court intended by ignoring the context in which they were decided.

In *Knudson*, the Court addressed whether the remedy of restitution was legal or equitable. Recognizing that restitution historically had been a remedy available at both law and equity, the Court drew an admittedly "fine distinction" and found that not all restitution claims were cognizable in equity. *Id.* at 212-14. As the Court explained, where "the plaintiff could *not* assert title or right to possession of particular property . . . the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit." *Id.* at 213 (internal quotations omitted). In contrast, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* (citations omitted). Thus, in distinguishing legal restitution from equitable restitution, the Court focused on whether the plaintiff is able to identify specific funds or property in the defendant's possession. *Id.* Because the funds in *Knudson* were placed by law in a state trust, beyond the reach of

the participant, Great-West could only present a legal restitution claim akin to that of a general creditor. *Id.*

In *Sereboff*, the Court was called upon to apply *Knudson* to another ERISA equitable restitution claim. After restating the governing legal rules for examining equitable restitution claims, the Court found that the "impediment to characterizing the relief in *Knudson* as equitable is not present here." 126 S. Ct. at 1874 ("This Court in *Knudson* did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Mid Atlantic does.").[7] Moreover, the Court rejected the wooden "application of all the restitutionary conditions—including restitutionary tracing rules—to every action for an equitable lien under [Section] 502(a)(3)." *Id.* at 1876. That is, while recovery through equitable restitution requires the existence of an identifiable fund, it does not require the plaintiff to trace those funds or its product to a particular account. *Id.* Rather, the Court in *Sereboff* merely drew a distinction between the facts of *Knudson*, where "equitable restitution was unavailable because the funds sought were not

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[7] In so doing, the Court condemned the use of manipulative tactics—such as dissipation, commingling, and wrongful transfer of funds—that have plagued recovery of monies owed to plans by beneficiaries. *See Schultz v. Progressive Health, Life, & Disability Benefits Plan*, 481 F. Supp. 2d 594, 595 (S.D. Miss. 2007) (explaining that "courts of appeal have interpreted *Sereboff* to allow a plan fiduciary to pursue a claim to recover overpayments, even where the funds have been dissipated by the beneficiary" (citing *Dillard's, Inc. v. Liberty Life Assuarance Co.*, 456 F.3d 894 (8th Cir. 2006)); *Popowski v. Parrott*, 461 F.3d 1367 (11th Cir. 2006)); *Smith v. Accenture U.S. Group Long-Term Disability Ins. Plan*, No. 05-C-5942, 2006 WL 2644957, at *2 (N.D. Ill. Sept. 13, 2006) ("[T]his court reads *Sereboff* as standing for the proposition that tracing of funds is unnecessary when a plan contract contains language creating an equitable lien by agreement."). For substantially the same reasons, the Court should reject Respondents invitation to adopt a rule that would permit fiduciaries or trustees to avoid the imposition of an appropriate equitable remedy simply because the plan funds are not traceable or have been wrongfully dissipated in violation of the plan.

in Knudson's possession," and the case before it, which did not suffer from this flaw. *Id.* (citing *Knudson*, 534 U.S. at 214)).

The Fourth Circuit, neglecting the limited context of these decisions, overread *Knudson* and *Sereboff* to broadly impose the "identifiable fund" requirement on all Section 502(a)(3) claims. The Court has cautioned against this approach: "*Knudson* simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution under a provision like that at issue in this case. There was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity[.]" *Id.* Indeed, in *Knudson* itself the Court identified at least one equitable remedy—"accounting for profits"—that is cognizable under Section 502(a)(3), but that would not meet the Fourth Circuit's bright-line identifiable fund requirement. *See Knudson*, 534 U.S. at 214 n.2 ("If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, *even if he cannot identify a particular res containing the profits sought to be recovered.*" (emphasis added)); *see also Sereboff*, 126 S. Ct. at 1876.

Here, by contrast, there is no need to determine whether the surcharge remedy is equitable or legal under a particular set of facts or draw "fine distinctions" between legal surcharge or equitable surcharge. As explained above, *see supra* Section I.A., there is no doctrine of "legal surcharge"; surcharge is *only* available in equity. Accordingly, the nature of the remedy sought, in and of itself, resolves the inquiry as required by *Mertens*, and a surcharge against the plan fiduciary plainly constitutes "appropriate equitable relief" under Section 502(a)(3). The Fourth Circuit's contrary decision should be reversed.

II. THE RULE ADOPTED BY THE FOURTH CIRCUIT WILL LEAVE PLAN PARTICIPANTS WITHOUT ANY EQUITABLE REMEDY AND WILL FUNDAMENTALLY UNDERMINE ERISA.

Interpretation of Section 502 cannot be divorced from the principal aims of ERISA. *See Russell*, 473 U.S. at 158 (Brennan, J., concurring) ("[C]ourts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries."); *see also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); *Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001) (explaining that tools of statutory construction "are designed to help judges determine the Legislature's intent as embodied in particular statutory language"); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part) ("Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes.").

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b); H.R. Rep. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights"); 120 Cong. Rec. 29929 (1974) (remarks of Sen. Williams) (explaining that ERISA imposes "strict fiduciary obligations upon those who exercise management or control over the assets or administration of an employee pension or welfare plan"); *Bixler*, 12 F.3d at 1299 ("Allowing an injured

beneficiary recourse through the courts is . . . essential to fulfilling the purpose of ERISA."); Daniel Robinson, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L. Rev. 1447, 1450 (2006) ("With ERISA, Congress . . . intend[ed] to protect workers from the risk of default or misadministration of their retirement plans.").[8]

ERISA fulfills this mandate by ensuring, through Section 502 civil actions, that those who participate in employer-funded retirement and benefit plans have legal recourse for improper administration of the plans. *See* 29 U.S.C. §§ 1109, 1132(a); *Healey v. Healey*, 910 F. Supp. 249, 251 (E.D.N.C. 1996) ("The purpose of ERISA generally, and the civil enforcement actions more specifically, is to establish standards for the administration of retirement plans and to give participants in retirement plans access to the federal courts to ensure appropriate remedies and sanctions."). The Fourth Circuit's decision undermines the core purposes of ERISA in at least three ways.

First, the decision leaves plan participants without any remedy for fiduciary misconduct in many, if not most, cases. *See* Pet. for a Writ of Cert. 11-12; U.S. Cert. Br. at 11. The civil remedies set forth in Section 502 of ERISA are the chief means of vindicating ERISA's overall purpose. Indeed, with respect to fiduciary liability, Section 502 is the only means of redressing a fiduciary's wrongful action. *See* 29 U.S.C. § 1132(a) (setting forth persons authorized to bring a civil action under ERISA). Congress, in enacting ERISA, broadly preempted remedies under state law, and only provided plan participants federal remedies for fiduciary misconduct under Section 502. *See* 29 U.S.C. § 1144(a); *see also Pilot Life Ins. Co. v. Dedeaux*,

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[8] *See also* Jeffrey A. Brauch, *Federal Common Law of ERISA*, 21 Harv. J.L. & Pub. Pol'y 541, 546 (1998) (noting that enactment of ERISA was in response to employers' defaulting on pension obligations); Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty under ERISA*, 41 Wayne L. Rev. 1233, 1237 (1995) ("[ERISA] was prompted in large part by the widely-held opinion that many workers who had been promised pensions were not receiving them.").

481 U.S. 41, 54 (1987) (holding that Section 502(a) creates a comprehensive and exclusive civil enforcement scheme); *Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1329 (11th Cir. 1998) ("[T]he Supreme Court has held that Congress created super preemption in ERISA, which provides the exclusive cause of action for the recovery of benefits governed by an ERISA plan.").

If the view of the Fourth Circuit prevails, however, plan fiduciaries will be free from all liability so long as the breach of duty is confined to a single plan participant, a small group of participants, or perhaps any number of participants short of 100 percent. *LaRue*, 450 F.3d at 572 ("Section 1132(a)(2) provides remedies only for entire plans, not for individuals."). Absent relief under Section 502, employees and former employees have little reason to trust that their investments are protected against unlawful actions. *See Pilot Life*, 481 U.S. at 54 (holding that civil enforcement scheme of Section 502(a) is exclusive). The Fourth Circuit's decision thus undermines ERISA by creating an exception that threatens to swallow the rule and fundamentally weakens employees' trust in the employer-based retirement plans contrary to the stated objectives of Congress in enacting this statute. *Graden*, 2007 WL 2177170, at *8 (explaining that "[s]uch a holding would allow an employer who mismanaged individual account plan assets to avoid liability by cashing out the participants" and therefore "find[ing] it hard to believe that Congress intended such a result.").

Moreover, the Fourth Circuit's interpretation does not prevent only plan participants from recovering under Section 502. Under Section 502(a)(2), "[a]ny fiduciary may bring a civil action against another fiduciary for breach of fiduciary duty." *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 626 (9th Cir. 1987) (citations omitted); *see also Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2316 (2007) (explaining that "an employer's fiduciary duties under ERISA are implicated . . . when it acts" as the plan administrator). Indeed, ERISA specifically provides for co-fiduciary liability under certain circumstances. *See* 29 U.S.C. § 1105(a) (providing that "[i]n addition to any liability which he

may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan"); *see, e.g.*, *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 103 (2d Cir. 1998) ("Silverman claims that Principal's failure to investigate and take steps to recover the $130,000 in missing plan assets constituted a breach of its co-fiduciary duties under 29 U.S.C. § 1105(a)."). Extended to its logical conclusion, however, the decision below would prevent plan administrators, including employers, from bringing suit against other plan fiduciaries to recover plan assets. Subjecting employers, particularly those that operate self-funded plans, to the artificial limitations the Fourth Circuit grafted onto Section 502(a)(2) thus will cause substantial damage to ERISA plans by preventing recovery absent a massive breach.

This same untenable limitation also would bar the federal government from imposing liability on plan fiduciaries. Section 502(a)(2) treats "the Secretary [of Labor]" and "participant[s], beneficiar[ies], [and] fiduciar[ies]" alike in their ability to bring suit under Section 409. 29 U.S.C. § 1132(a)(2). The same limitations on individual suits that the Fourth Circuit reads into the statue would thus apply to suits by the federal government seeking to redress fiduciary misconduct. *See* Secretary of Labor's Amicus Curiae Brief in Support of Petition for Rehearing and Rehearing En Banc at 7-8, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359 (4th Cir. 2006) (No. 05-1756) (noting role of Secretary of Labor in bringing numerous cases against "fiduciaries who failed to forward some, but not all, employee contributions to their plan"). Accordingly, because the decision below guts any deterrent to misconduct by plan fiduciaries in many if not in most cases, it cannot be squared with the core purposes underlying ERISA.[9]

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[9] The Fourth Circuit consoled Petitioner by noting that Congress had made available other remedies: Petitioner could "seek an injunction compelling compliance with his investment instructions" or "bring suit on the plan's behalf to remove the fiduciary." *LaRue*, 450 F.3d at 578. There remedies ring hollow, however, because a plan fiduciary is hardly likely to announce in advance that he intends to disregard a plan

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Second, the decision is irreconcilable with the basic tenet of ERISA that a fiduciary owes a duty to each plan participant. *See* 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."); *see also Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) (rejecting argument that fiduciary duty under ERISA did not extend "beyond plan asset management to individual beneficiaries"); *Gaither*, 388 F.3d at 775 n.6 ("Both Justice Brennan's [*Russell*] concurrence and the Court's opinion in *Howe* make it clear that although a fiduciary must be impartial among the various beneficiaries, it still owes fiduciary duties to each individual beneficiary."); *Spencer v. Central States, Southeast and Southwest Areas Pension Fund*, 778 F. Supp. 985, 995 (N.D. Ill. 1991) (explaining that ERISA fiduciary owed a fiduciary duty to individual beneficiaries as well as the plan itself).

Under the Fourth Circuit's approach, instead of owing a fiduciary duty to each plan participant, a fiduciary owes a duty only to the plan as a whole. *See LaRue*, 450 F.3d at 574 (fiduciary duty owed "solely to" Petitioner unenforceable under the Fourth Circuit's interpretation of § 1132(a)(2)). A fiduciary thus could decide to affirmatively harm a plan participant (or several participants in unrelated ways), and the injured plan participant(s) would be without any recourse under ERISA. Under such a regime, a backlash against ERISA plans is inevitable. Employees will have less confidence in retirement or benefit plans in the face of a judicial declaration that Congress did not intend individual protection of employees. Indeed, plans that offer to employees investment choices may become

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participant's investment instructions or otherwise misappropriate a participant's funds. The Fourth Circuit's suggestion is somewhat akin to suggesting that a patient is fully protected from medical malpractice by law because he can always secure an injunction to prevent his surgeon from performing a second wrongful operation, or, if absolutely necessary, get court permission to change doctors. Putative remedies of this nature afford no real relief to plan participants and provide no real deterrent to fiduciary misconduct.

disfavored when employees learn that their investment instructions are unenforceable. *See* U.S. Cert. Br. at 12.

Furthermore, to the extent that other courts follow the Fourth Circuit's mistaken interpretation of *Knudson* and *Sereboff* and insist on possession and/or traceability as prerequisites to equitable recovery, plan fiduciaries and participants will continue to cynically manipulate ERISA-related funds. Plan fiduciaries will fail to exercise proper care in handling participants' funds safe in the knowledge that the courts have confronted participants with a high bar to recovery. For their part, plan participants, encouraged by trial lawyers, will continue to convert and commingle funds in obvious attempts to avoid the equitable restitution that is required under ERISA. Fiduciaries and participants alike have an equitable obligation to adhere to the terms of the plan and not dissipate plan assets. *See Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997) ("A primary purpose of ERISA is to ensure the integrity and primacy of the written plans"). Given these basic purposes of ERISA, Section 502(a)(3) cannot be read to limit recovery to those cases in which the plan funds can be traced to a specific account held by the wrongdoer. *See* 29 U.S.C. § 1001(b) (explaining that ERISA "provide[s] for appropriate remedies, sanctions, and ready access to the Federal courts"); *McGann v. H & H Music Co.*, 742 F. Supp. 392, 393 (S.D. Tex. 1990) (explaining that ERISA was enacted to "protect the solvency of employee benefit plans to ensure that the valid claims of employees and their beneficiaries will be paid" (citation omitted)).

Thus, if the Fourth Circuit's ruling is adopted, ERISA plans and plan participants will continue to suffer higher costs from the gamesmanship of a selfish few. *See, e.g.*, *Reichert v. Liberty Life Assurance Co.*, No. 05-2518, 2007 WL 433321, at *12 (D.N.J. Feb. 5, 2007) (despite concededly valid equitable claim under ERISA, plan participant did not have to return overpayments that had been squandered); *Sec. Mut. Life Ins. Co.*, 2007 WL 1944345, at *3 (court ordered discovery as to overpayments, but noted that recovery would be precluded if defendant "dissipated" overpayments). Congress could not have intended that inefficient

or dishonest transactions would allow parties to evade their equitable responsibilities under ERISA. The Fourth Circuit's opinion unjustifiably truncates the statutorily required fiduciary duty owed to plan participants, undermines public confidence in ERISA, and encourages wasteful, inefficient, and sometimes unlawful behavior. *Hollingshead v. Burford Equip. Co.*, 747 F. Supp. 1421, 1426 (M.D. Ala. 1990) ("ERISA is a remedial statute designed to protect the interests of employees by guarding against abuse in the administration of such benefit plans, and to protect employers from conflicting and inconsistent state regulation of such plans.").

Third, the Fourth Circuit's ruling will inevitably prove to be judicially unmanageable in practice, because the decision gives no guidance as to how many plan participants a fiduciary must injure before the wronged parties can file suit under Section 502(a)(2). In its decision denying rehearing en banc, the Fourth Circuit first stated that Section "502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359, 362 (4th Cir. 2006). The court went on to suggest, however, that it accepted the logic of circuit courts that have held otherwise, stating "liability under [Section] 502(a)(2) is not limited to losses that accrue to *all* plan participants." *Id.* at 363. The Court attempted to explain the distinction by stating that liability is limited to "plan losses," *id.*, but left unexplained how the diminution of one participant's interest in the plan is not a plan loss while the diminution of some greater number of participants' interests is a plan loss despite the fact that not all plan participants are affected.

As the Solicitor General and Petitioner both note, "approximately 91% of all private retirement plans have fewer than 100 participants." U.S. Cert. Br. at 11. In such plans, a handful of individuals will make up a significant percentage of plan participants. Courts facing a fiduciary breach that affects only some of the participants will have to analyze claims that are individualized yet affect a relatively high percentage of plan participants. Unpredictability and instability are toxic to a regime

such as ERISA. *See Cann v. Carpenters' Pension Trust Fund for N. Cal.*, 989 F.2d 313, 317 (9th Cir. 1993) ("[T]he congressional purpose [of ERISA] emphasized promotion of 'the soundness and stability of plans with respect to adequate funds to pay promised benefits.'" (quoting 29 U.S.C. § 1001(a)); *Hollingshead*, 747 F. Supp. at 1426 ("Congress enacted ERISA in 1974 in an attempt to establish stability and prevent loss, thereby providing comprehensive federal regulation of all plans which provide fringe benefits to employees."); *McKinnon v. Cairns*, 698 F. Supp. 852, 859 (W.D. Okl. 1988) ("When enacting ERISA, Congress intended to establish a comprehensive remedial scheme to resolve problems in private employee benefit plans and to provide security, stability and uniformity in this area." (citing 29 U.S.C. §§ 1001(a)-(b)).

Moreover, Respondents' suggestion that a subclass must contain "a significant number of participants" before Section 502(a)(2) relief is available does not provide a path out of the quandary. Br. in Opp'n at 8.[10] A court trying to decide what

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[10] Though Respondents might answer that a subclass is "significant" if it contains enough members to necessitate proceeding as a class action, this argument overlooks the facts that (1) nothing in ERISA incorporates the standards of Federal Rule of Civil Procedure 23 by reference; and (2) Rule 23 does not breathe life into otherwise invalid claims, but merely provides a means to consolidate common *valid* claims into a single suit. *See, e.g., Lyon v. Atl. Coast Line R.R. Co.*, 224 F. Supp. 1014, 1017 (D.S.C. 1964) (Rule 23 "has never been interpreted so as to deprive a person of an individual claim if such claim would have existed in the absence of the rule."); *Cox v. Hutcheson*, 204 F. Supp. 442, 447 (S.D. Ind. 1962) (noting that entire action should not "be summarily dismissed merely because it fails as a class action"). The idea that a plaintiff may not seek recourse in federal court without first proving that the defendant wronged numerous others in the exact same way seems wholly foreign to American law, and nothing in the text or legislative history of ERISA suggests that Congress intended to introduce this bizarre notion into American jurisprudence. *See Int'l Woodworkers of Am., AFL-CIO, CLC v. Georgia-Pacific Corp.*, 568 F.2d 64, 66 (8th Cir. 1977) ("[A] litigant's individual claim survives the determination that he cannot maintain his action as the

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"significant" means will be left to puzzle over the fact that the Fifth Circuit considered a fiduciary breach that affected 1 in 390 participants to be significant, *see* U.S. Cert. Br. at 10, while the Fourth Circuit rejected a breach that affected 1 in 300 participants as insignificant, *LaRue* 450 F.3d at 574. *See also* U.S. Cert. Br. at 10. Accordingly, the rule endorsed by the Fourth Circuit will prove to be unworkable in practice because there is no logical, coherent, or just way to distinguish between otherwise identical fiduciary breaches that affect a "significant" subset of plan participants and breaches that affect fewer participants. Courts attempting to craft such a rule on an ad hoc basis will doubtless employ conflicting rationales that will require further intervention by either Congress or this Court. It would be far better for this Court to adhere to the plain language of the statute and allow recovery to the plan in any case in which the plaintiff can show a fiduciary breach.

CONCLUSION

For the reasons set forth herein, the judgment of the Fourth Circuit should be reversed.

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representative of a class under Fed. R. Civ. P. 23."); 32B Am. Jur. 2d *Federal Courts* § 1679 (2007) ("Provided the district court has jurisdiction, a litigant's individual claim survives the determination that the litigant may not maintain his or her action as the representative of a class under Rule 23.").

Respectfully submitted,

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